92-1561

No. ——

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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RENSSELAER CENTRAL SCHOOL CORPORATION,
*Petitioner,*

v.

JOSHUA H. BERGER and MORIAH H. BERGER,
b/n/f ALLEN H. BERGER,
*Respondents.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A school district in Indiana adopted a written policy opening its elementary and high school campuses twenty-four years ago to community groups who wished to speak to and/or distribute their literature to students during school hours. Over the years representatives of several varied groups spoke to students and distributed literature, including local members of the Gideons International. Though the brief, non-proselytizing message and literature distribution by the Gideons passed Constitutional muster with the district court, the circuit court found the failure of the school corporation to censor the religious speech to be an Establishment Clause violation.

1. Did the Seventh Circuit err in holding that the school corporation's community literature distribution and access practices violated the Establishment Clause, based on its virtually exclusive reliance on a case in which this Court strictly limited the holding to overt, formal and explicit "religious exercises", which are not present in this case?

2. Did the Seventh Circuit err in holding the school corporation's policy and practices to be violative of the Establishment Clause in that the state in the instant case: 1.) did not decide that the questioned activity would occur; 2.) nor choose the speaker to give the questioned message; 3.) nor determined or counseled the content of the message.

3. Is the Seventh Circuit Court's opinion, which mandates discrimination against private religious speech, in conflict with the opinions of this Court concerning non-public fora?

4. If the Seventh Circuit's opinion is allowed to stand, would it not serve to erect an absolute wall of separation between students in state-run schools and religious persons with religious messages and values, contrary to the opinions of this Court?

## PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case.*

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* The Rensselaer Central School Corporation is a unit of government in Indiana. Consequently, it has no parent or subsidiary companies.

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### DECISIONS BELOW

The decision of the court of appeals is reported as *Berger v. Rensselaer Central School Corporation*, 982 F. 2d 1160 (7th Cir. 1993). The decision of the district court granting summary judgment is reported as *Berger v. Rensselaer Central School Corporation*, 766 F. Supp. 696 (N.D. Ind. 1991).

### JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment in this case on January 5, 1993, with an Order amending opinion entered on February 17, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

The regulations of the Rensselaer Central School Corporation governing the distribution, display or exhibit of materials on the campuses of the school corporation from persons and groups in the community are set forth in Appendix D (App. 46a).

## STATEMENT OF THE CASE

This is a case about content and viewpoint-based censorship of private religious speech from a forum opened by the school corporation to speakers from the community and for the distribution of literature by persons from within the community. It does not involve a "religious exercise" as that term has been used by this Court.

Petitioner Rensselaer Central School Corporation (hereinafter "Rensselaer") adopted a policy in December, 1969 by which it allows various persons, groups or organizations from the community to distribute, display or exhibit materials in the various schools within the school district. The policy is content neutral and makes no reference to the religious content of materials distributed. Under the policy a number of varied community groups have distributed materials on the Rensselaer campuses, including local members of Gideons International (hereinafter "Gideons"). Respondent Berger, a parent of children in the school system, sought injunctive and declaratory relief under 42 U.S.C. § 1983, which was denied in the district court, but essentially granted in the circuit court of appeals. Accordingly, under the circuit court's opinion the school corporation must now censor messages given and literature to be distributed by private persons from the community on school campuses, based purely upon the religious content of the private speech.

**A. Statement of Facts**

The Rensselaer Central School Corporation owns and operates public schools in the City of Rensselaer located in Jasper County, Indiana, a rural county in northwest Indiana. In December, 1969 Rensselaer adopted a policy entitled Distribution, Display or Exhibition on School Property. (App. 46a). The policy provides for access to distribute literature on "school corporation premises" by "persons, groups or organizations" from the community.

Under this policy Rensselaer's classrooms have been opened, during class hours, to various speakers from the community and to a diverse assortment of printed literature from private citizens of the community distributed to Rensselaer's students:

A. Speakers from the following community groups have addressed students in Rensselaer's classrooms:

1. 4-H;
2. Boy Scouts of America;
3. Tri-Kappa Sorority;
4. The Gideons; and
5. Other unnamed groups.[1]

B. 4-H, Boy Scouts of America, Girl Scouts of America, Summer Athletics and other unnamed groups have distributed parent permission forms for participation in their various youth activities in the classroom.

C. A book from a "variety of businesses" in Rensselaer promoting good citizenship, responsibility, earning others' trust, the dangers of drug use, honesty, tenacity and gratefulness has been distributed in Rensselaer's classrooms.[2]

D. Rensselaer made literature available to students to participate in "Readathons" (sponsored by the University of Notre Dame), "Marathons" and the Daughters of American Revolution History Essay Contest.

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[1] School Corporation Superintendent Dinsmore stated in her deposition that ". . . the 4-H, the Boy Scouts and et cetera have been allowed to *speak* to students . . . this last year Tri-Kappa had an art activity content, if you will, for the elementary students, and they came in and explained the procedure and et cetera." (Emphasis added)

[2] The book entitled, *The Way To Go*, was presented to Rensselaer School students by McDonald's of Rensselaer, Bank One Rensselaer, NA, Betty Williams and Associates, Tillett Engineering Services, Inc., Jackson Funeral Home and Steffen's Jewelry.

E. Religious literature from sources other than the Gideons was distributed in the Rensselaer school system in the past, including a book entitled *Young People of the Bible*, distributed by In Jesus' Love Foundation, Inc. of Rensselaer, along with two local businesses.

F. For as long as anyone can remember, but probably beginning in the fifties, Rensselaer has allowed the distribution of religious literature by local members of the Gideons International.

Religious literature distributed by the Gideons in the Rensselaer School System was generally distributed only after parents received parental permission slips. However, after 5th grade classes were combined in the Middle School in the years of 1986, 1987 and 1988, permission slips were not used. Parental permission slips for the receipt of Bibles were a regular policy and practice in the years 1980-1985 while fifth grade students were still at the Monnett Elementary School. Prior to, as well as after the parental permission slip policy went into effect, Gideon representatives would tell each child that they would have to take the literature home to their parents and ask permission to keep the literature, otherwise the literature was to be returned.

In the most recent three years (1986, 1987 and 1988) of distribution of religious literature under Rensselear's policy, the Gideons distributed religious literature in two of those years *outside* of the classroom (1986, 1987). In 1986 religious literature presented by the Gideons was "placed on a table in the hallway outside (the principal's) office".

In 1987 religious literature presented by the Gideons was placed in a box "inside the gymnasium door" for students to obtain a copy as they left the gymnasium. In both years of literature distribution in or near the hallway, 1986 and 1987, fifth grade students first assembled in the gymnasium of the school to hear a brief

presentation by Gideon members.[3] After the presentation, students in 1986 could walk, if they so chose, to the office area of the school and obtain a copy of the religious literature from a box in the hallway, or in 1987 they could walk to the box at the doorway of the gymnasium to obtain a copy. Consequently, religious literature distribution by the Gideons in the actual *classrooms* of the school corporation in the six years since 1985 only occurred in one year, 1988.

Rensselaer Superintendent Dinsmore testified that religious literature was never "passed out" to Rensselaer students:

> "One was that the books were never passed out to the students—and that term is used consistently—but rather the students obtained them by coming forth or going someplace else to pick up the particular books. . . No one led students to the books, passed books out, or any thing of the sort." [4]

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[3] All deponents testified that the Gideons spoke very briefly, usually "thirty seconds to a minute" (Superintendent Dinsmore); "thirty seconds" (Teacher Brooks); "a minute and a half or a couple of minutes" (Principal Lewis).

[4] In the "delicate, fact-sensitive" area of Establishment Clause jurisprudence the individual facts are obviously relevant. In the circuit court's January 5, 1993 slip opinion the court erroneously wrote that "after the presentation, the students were lined up and instructed to take a Bible from a stack sitting on a table or desk." In its Order amending its opinion (App. C, p. 44a), following the filing of a Petition for Rehearing, the circuit court removed the words "lined up and" so that the sentence now reads, "after the presentation, the students were instructed to take a Bible from a stack of Bibles placed on a table or desk." (App. 8a) However, even with the deletion of the clearly erroneous phrase "lined up and", which is nowhere in the record, the circuit court's factual conclusion remains flawed. *No one "instructed" students to take Bibles*, neither the teacher, who was silent, nor the Gideons who stressed the voluntary, parentally-approved nature of the literature distribution. The district court's analysis of this factually crucial part of the case was that though the classroom teacher was present, she "observed silently from another part of the room". (App. 28a) The district

Superintendent Dinsmore testified that distribution of material under the policy, whether religious or not, was all done "outside the instructional time." Testifying that the school is guided by State Department of Education Guidelines, Superintendent Dinsmore stated that the School Corporation has additional minutes in each day outside of instructional time which may be used for community speakers or community literature distribution.

In the only year in the last six years in which religious literature was distributed by the Gideons in Rensselaer classrooms, a teacher who was present at the time of the distribution summarized what occurred in the following manner:

> "The Gideons came to the classroom with a box of Bibles, put the box on the first desk inside the door, explained to the children who the Gideon organization was, what the Gideon organization is and does, and told the children that if their parents would not object they would be allowed to take a Bible."

Teacher Brooks noted that she didn't know if all of the children accepted a Bible "because I didn't pay attention and I did not sort out those who did not." She testified that "I played no role" in the distribution of religious literature in her classroom. All of the witnesses testified that there was no scripture taught by the Gideons and no proselytizing efforts made by Gideon representatives in the classroom.

Teacher Brooks also testified that literature from other organizations, besides the Gideons, had been distributed by organizations in the classrooms. She acknowledged that

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court found that the only representative of the state in the classroom, the teacher, took *no* action in regard to the literature distribution, "at no time would the teacher say anything, or participate in the handing out of Bibles." (App. 28a) Thus the state could hardly be said to have forced any given activity by any student, because the state stood silent, for this distribution, as well as for other literature distribution by other community groups.

the book *The Way To Go* had been distributed in 1988, and to some classes in 1989. Likewise, Principal Lewis acknowledged that the book *The Way To Go* had been distributed in his school.[5] Respondent Allen Berger testified that a book entitled *Young People of the Bible* had been distributed in the Rensselaer School System, not by the Gideons, but instead by a group entitled "In Jesus' Love Foundation of Rensselaer, Indiana." However, neither Berger child ever received a copy of either *The Young People of the Bible* or a copy of a Gibeon Bible on school corporation premises.

**B. Course of Proceedings**

This action was initiated in federal district court by Allen H. Berger on May 15, 1990 on behalf of his two minor children, Joshua H. Berger and Moriah H. Berger ("Berger"), who were then enrolled as students in the first and fifth grades in the Rensselaer Central School Corporation. In his initial action Berger sought a declaratory judgment, as well as preliminary and permanent injunctive relief. Specifically, Berger challenged Rensselaer's community literature distribution and access policy adopted in 1969 (App. D). Berger challenged Rensselaer's granting of access to classrooms within the school corporation for community speakers and for the distribution of community literature which was of a religious nature.

Following discovery and briefing on the issue of whether a justiciable controversy existed giving Berger

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[5] An examination of the contents of *The Way To Go* discloses that the book promotes general principles of morality and right living. Indiana statutory law (I.C. 20-10.1-4-4) mandates the public schools of Indiana to teach "honesty, morality, courtesy, obedience to law, respect for the national flag, the Constitutions of the United States and Indiana, respect for parents and home, the dignity and necessity of honest labor and other lessons of a steadying influence which tend to promote and develop an upright and desirable citizenry."

standing to sue, the district court on June 22, 1990 ordered the parties to brief the substantive first amendment questions raised in Berger's amended complaint. The district court then proceeded to conduct a hearing on October 19, 1990 on the parties' cross-motions for summary judgment.

On May 7, 1991 the district court found in favor of Berger on the question of standing initially raised by Rensselaer. (App. B, p. 24a) However, the district court denied Berger's petition for declaratory and injunctive relief and held that Rensselaer's community literature distribution and access policy did not violate the Establishment Clause of the First Amendment to the Constitution of the United States of America. The district court found that ". . . the regime in Rensselaer under which these materials are made available to students does not run afoul of the First Amendment's Establishment Clause."

The district court applied this Court's Establishment Clause jurisprudence as found in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) and concluded that Rensselaer's content-neutral policy violated none of the three prongs of the *Lemon* test, as modified. As to the first prong, i.e., a secular purpose for the policy, the district court held that the Rensselaer policy was "motivated by at least one of many possible secular concerns." (App. 40a) As to *Lemon*'s second prong, the effect of the policy, the district court held that:

> "The court finds that no observer, Christian adherent or not, could reasonably view the Gideon organization's distribution of Bibles in the Rensselaer schools as an endorsement of the Christian faith. Permitting the local Gideons to circulate their literature in public school classrooms is no more an endorsement of Christianity than allowing little league baseball to disseminate its materials endorses the national pastime. Nor would a reasonable observer perceive a similar leaflet campaign by the American Civil Lib-

> erties Union or the Anti-Defamation League of B'nai B'rith as an endorsement of the respective views of these organizations . . . [i]n this case, *where the Bibles emanated not from the teacher but from a private actor, who did not engage in a proselytizing recitation of scripture and verse, but merely invited each student to take a Bible and read it, the court finds that no message of official endorsement resulted.* The defendant's policy offering school students exposure to the many facets of their local community (including the religious) does not constitute the school's imprimatur as to each such facet." (App. 41a-42a, emphasis added)

Under the third *Lemon* prong the district court held that any level of "school involvement with the Gideon's distribution of Bibles is merely incidental and does not rise to the level of an 'excessive entanglement' with religion." (App. 43a)

The district court observed that if the Bergers were:

> "to have their way, the Rensselaer School System would exclude only religious groups from access to its classrooms. All other groups seeking permission to distribute their literature would be welcomed. In such a case, could an observer conclude other than that the purpose of the exclusion was to *disapprove* of religion? Such a purpose would be manifestly hostile to religion generally and thus run afoul of the first *Lemon* prong. The school system's policy permitting the dissemination of literature of many local groups, whether of a religious affiliation or not, thus cannot reasonably be said to be an endorsement of any particular secular or religious viewpoint." (App. 42a, emphasis by the court)

Respondent Berger appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit. On January 5, 1993 the circuit court reversed the entry of summary judgment against Berger. *Berger v. Rensselaer Central School Corporation*, 982 F. 2d 1160 (7th Cir. 1993) (App. A, p. 1a).

In its opinion the circuit court noted that briefs in the case before the circuit court had been filed eighteen months prior to the January, 1993 opinion, but that oral argument had been postponed because of the pending case before the United States Supreme Court of *Lee v. Weisman*, ——— U.S. ———, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992). The circuit court noted that the briefs of both parties, as well as *amici* submissions, anticipated that this Court would likely render an opinion in *Lee* which would have some significant impact on the pending case. The circuit court stated that "as a result" of the decision of this Court in *Lee* it arrived at its opinion, citing *Lee* no less than twenty-six times in its opinion. The circuit court held that its understanding of precedent, "and in particular *Lee* itself, compel(s) us to reverse the district court's decision sanctioning the Rensselaer Central School Corporation's policy toward the Gideons" (App. 19a). Though the circuit court briefly referred to this Court's holding in *Lemon*, its opinion frequently cited this Court's holding in *Lee* as leading the circuit court to the conclusion that the Rensselaer policy failed to pass Constitutional muster. The Court specifically stated the basis of its opinion when it observed that "in so holding, we have taken our lead from *Lee* and not relied on the structure of *Lemon*" (App. 22a).

The circuit court failed to set forth in detail how the state, i.e., the Rensselaer Central School Corporation, itself, either through its policy or practice violated the First Amendment. The circuit court even held that ". . . we are confident that the school district's policy is not aimed at promoting the religious values of the Gideons . . .", but the circuit court failed to identify any governmental interest—compelling, substantial, or even rational —which allegedly supported the exclusion of private speakers from government facilities, solely on the basis of the religious content or purposes of the private speech.

## REASONS FOR GRANTING THE WRIT

This case presents the question as to whether or not a public school district which opens its campuses generally to non-school community groups to speak to and distribute literature to students, may deny permission to particular community groups based solely upon the religious content of their message.

This case presents a classic instance of the misapplication of a "delicate, fact-sensitive" holding in one case to a widely different factual setting in another. In *Lee* an "overt," "formal," "explicit religious exercise" was found to be violative of the Constitution's Establishment Clause, this Court holding that the "sole question presented is whether a religious exercise may be conducted" if students are induced to conform to or "participate in a religious exercise." The instant case presents *no* "overt", nor "formal", nor "explicit religious exercise" of any nature. Thus, the circuit court's virtually exclusive reliance on *Lee* is misplaced.

This case further presents the question to this Court as to whether the circuit court exceeded and misapplied the holding of this court in *Lee* as to the involvement of a school district with non-school community persons. Unlike *Lee*, in this case the state did not decide to conduct or allow a Bible distribution; did not select the person or persons to conduct the distribution; and did not instruct nor counsel the non-school community group as to the content of the message to be presented to students. The decision by the circuit court appears to be contrary to the conclusion of this Court in *Lee* in which this Court held that:

> A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. (Citing *Abington School District v. Schempp*, 374 U.S. 203 (1963)). We recognize that, at graduation time and throughout the course of the educational process, there

> will be instances in which religious values, religious practices and religious persons will have some interaction with the public schools and their students." (Citing *Westside Community Bd of Ed. v. Mergens*, 496 U.S. 2266 (1990) (120 L. Ed. 2d 467, 488).

The decision of the circuit court conflicts with the prior decisions of this Court concerning non-public fora. By opening its campuses to community groups and associations, Rensselaer created a limited public forum. Control over access to a non-public forum can be based on subject matter or speaker identity, but must be viewpoint-neutral. Any attempt to exclude speech on the basis of its religious nature is viewpoint-discriminatory, and thus improper.

The circuit court, post *Lee*, would appear to be holding that there must be a complete extirpation of any religious contact by private religious persons from the community with their community's students. This holding would erect an absolute wall of separation between public students and religious persons from the community, and is, consequently, in conflict with the ruling of this Court in *Lee*.

Therefore, this petition for writ of certirorari should be granted under both parts of Supreme Court Rule 10.1(c), in that the circuit court decided a federal question in a way that conflicts with applicable decisions of this court; and further, that this case presents an important question of federal law which has not been, but should be, settled by this Court. This case appears to be a case of first impression in this Court as to the Constitutionality of the distribution of Bibles in public schools. This is a question which has been decided in conflicting ways by state and federal courts across the country.[6]

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[6] "Thus, certain courts in some jurisdictions support the view that Bible distribution in public schools may be permissible[], while the courts in other jurisdictions have concluded that general

## I. THE DECISION OF THE SEVENTH CIRCUIT HOLDING THAT THE SCHOOL CORPORATION'S COMMUNITY LITERATURE DISTRIBUTION AND ACCESS PRACTICES VIOLATED THE ESTABLISHMENT CLAUSE IS IN ERROR IN THAT THE DECISION OF THIS COURT UPON WHICH THE CIRCUIT COURT PRIMARILY RELIED WAS STRICTLY LIMITED TO OVERT, FORMAL AND EXPLICIT RELIGIOUS EXERCISES, AND THUS DOES NOT APPLY TO THIS CASE.

As noted above, the Seventh Circuit Court of Appeals rested its opinion almost exclusively on the opinion of this Court in *Lee v. Weisman*, —— U.S. ——, 112 S. Ct. 2649, 120 L. Ed. 2d 467. Though the circuit court referred in passing to this Court's holding in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, its frequent citation of *Lee* and its failure to examine any one of *Lemon*'s three prongs, or for that matter the endorsement doctrine arising under *Lemon* (see Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984)) leads to the conclusion that the circuit court quite accurately stated the basis of its opinion when it observed that "in so holding, we have taken our lead from *Lee* and not relied on the structure of *Lemon*." (App. 22a)[7]

Rensselaer would respectfully assert that the circuit court's reliance on *Lee* is misplaced. This Court in *Lee* concluded its opinion by specifically holding:

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distribution of Bibles to students is impermissible" (111 A.L.R. Fed. 135). Though these opinions are not differing opinions between federal courts of appeal, they do present differing interpretations of an important federal question.

[7] The district court however dealt extensively with the three prongs of *Lemon* and concluded that the Rensselaer policy and practices did not violate any of the three prongs of *Lemon*, nor the modified endorsement test under *Lemon*. (App. pp. 37a-43a)

> The *sole question* presented is whether a *religious exercise* may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a *religious exercise*. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment. (120 L. Ed. 2d 467, 488, emphasis added.)

Because the circuit court relied virtually exclusively on *Lee*, and because this Court in *Lee* specifically limited the application of *Lee* in this "delicate, fact-sensitive" area of the law to whether a "religious exercise may be conducted", that then leads to an examination of this Court's use and imputed meaning of the phrase "religious exercise."

The "religious exercise" referred to in *Lee* consisted of the giving of an invocation and a benediction at a middle school graduation ceremony. The invocation and benediction involved the audience standing during the Rabbi's prayers, or remaining in silence. In *Lee* this Court found that the "state officials direct(ed) the performance of a formal religious exercise" (120 L. Ed. 2d 467 at 480). This Court found that the prayers (prayer being mentioned 42 times in the decision) constituted an "explicit religious exercise" (p. 487); a "formal religious exercise" (p. 480); an "overt religious exercise" (p. 481); a "formal exercise" (p. 483); a "prayer exercise (3 times)" (pp. 484, 487); and a "religious practice" (p. 484). In fact, this Court used the phrase "religious exercise", in several variants, no less than twenty-three (23) times in *Lee*. Consequently, one must then be struck by the limitation placed upon *Lee* by this Court by which this Court limited the application of *Lee* to "religious exercises."

Therefore, the point of relevant inquiry becomes what action or activity took place in the Rensselaer schools

which could in any meaningful sense be described as a "religious exercise"? In the instant case the record is without contradiction that the Gideon representatives availed themselves of the Rensselaer literature distribution policy (App. 46a) by speaking briefly to fifth grade classes in Rensselaer's Middle School in the autumn of the school year. The record confirms that the presentation given by the Gideons was relatively short, *i.e.*, the shortest estimate of time being thirty seconds and the longest estimate of time being two minutes. The circuit court described the actions of the Gideons in this way:

> "They spoke for a minute or two *about their organization*—their exact statements are not in the record —and offered up a painful pun that the books, the covers of which were red, were meant to be read." (App. 8a, emphasis added)

The circuit court further noted that "the teachers, though present, did not participate in handing out the Bibles" (App. 8a). The court further found that students were "frequently told to take the publications home to their mothers and fathers and to return the books to their teachers if their parents objected." (App. 8a).

This simple activity then appears to constitute the objectionable action which the circuit court found violated the Establishment Clause, i.e., that private religious speakers from the Rensselaer community visited Rensselaer campuses once a year to distribute Bibles[8] and to speak for a brief period of time "about their organization." The record confirms that none of the statements made by these private religious speakers to Rensselaer students were proselytizing in nature.

Therefore, the conclusion by the circuit court that *Lee* must determine the outcome of this case must be seen as

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[8] The circuit court did not specify which religion, i.e., Christianity or Judaism, was established by the questioned action. The "Bibles" distributed by the Gideons contained not only the text of the New Testament (Christianity), but also the text of Proverbs and Psalms from Judaism's sacred texts.

erroneous. *Lee* by its facts, as well as the specific holding stated by this Court, *only applies to an "explicit"*, "formal", or "overt religious exercise." Obviously, prayer is such an exercise. However, can one seriously argue that a statement by a private religious person as to one's "organization" and the distribution of religious material constitutes a "religious exercise?" A disinterested observer, upon analysis of this Court's opinion in *Lee* could come to an understanding as to the concern that this Court had with the actions by the school officials in Providence, Rhode Island regarding persons who were in attendance at a graduation ceremony who may have felt pressured into either participation in a "religious exercise" or "embarrassment" as to the religious exercises taking place in their presence. However, those are just not the facts in this case. The voluntary distribution of a Bible by a private speaker cannot in any meaningful sense be held to be a *religious exercise*, in the same meaning as prayer or Bible reading, or verse recitation, or any other liturgical or proselytizing activity would be construed to be a "religious exercise." In fact, the district court found that the Gideons "did not engage in a proselytizing recitation of scripture and verse" (App. 42a).

The district court held that Rensselaer's written policy could be viewed as a trespass regulation controlling access by non-school persons or groups onto school campuses during school hours, "or it could be viewed as a program to make available to students locally generated literature reflecting many aspects of their community—civic, athletic, historic, as well as religious." (App. 40a). Interestingly, neither the district nor circuit court found that the brief, non-proselytizing activities by the Gideons constituted a "religious exercise" as barred under this Court's holding in *Lee*.

This Court in *Lee* clearly stated that the intention of the opinion in *Lee* was not to prohibit the involvement of religious persons with public schools:

> We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. (See *Westside Community of Ed. vs. Mergens*, 496 U.S. 226 (1990).[9]

Because the circuit court failed to set forth in any detail the basis upon which Rensselaer's activities violated *Lemon*, or any other Establishment Clause case (except *Lee*) handed down by this Court; and because the circuit court's opinion was based upon *Lee*, but failed to distinguish the critical difference between a religious exercise as proscribed by *Lee* and mere literature distribution; therefore the circuit court's opinion is left without any significant jurisprudential foundation and must be reversed.

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[9] In Justice Souter's concurring opinion in *Lee* (joined by Justices Stevens and O'Connor) Justice Souter notes his understanding of the holding in *Lee*, which sounds very much like it could have been crafted for the instant case. Souter wrote in footnote 8 (120 L. Ed. 2d 467, 508) of his concurring opinion that "If the state had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message it would have been harder to attribute an endorsement of religion to the state . . . But that is not our case. *Nor is this a case where the state has, without singling out religious groups or individuals, extended benefits to them, as members of a broad class of beneficiaries defined by clearly secular criteria.* (citing *Widmar v. Vincent*, 454 U.S. 263, 274-275 (1981) and *Walz v. Tax Commissioners*, 397 U.S. 664 (1970), in which Justice Harlan stated: 'In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.' " (Emphasis added)

## II. THE DECISION OF THE SEVENTH CIRCUIT HOLDING THE SCHOOL CORPORATION'S POLICY AND PRACTICES TO BE VIOLATIVE OF THE ESTABLISHMENT CLAUSE IS IN ERROR IN THAT THE STATE IN THE INSTANT CASE NEITHER 1.) DECIDED THAT THE QUESTIONED ACTIVITY WOULD OCCUR; 2.) NOR CHOSE THE SPEAKER TO GIVE THE QUESTIONED MESSAGE; 3.) NOR DETERMINED OR COUNSELED THE CONTENT OF THE MESSAGE.

Only two circuit courts have applied *Lee* since it was handed down by this Court in June of last year. Besides the holding by the Seventh Circuit Court of Appeals below, *Lee* has also been construed by the Fifth Circuit Court of Appeals in *Jones vs. Clear Creek Independent School District*, 977 F. 2d 963 (5th Cir. 1992). What is interesting about these two cases is the wide divergence of application of *Lee* by the two circuit courts. In the instant case, the Seventh Circuit seems to have held that *Lee* requires the extirpation of any religious message by a private religious speaker having any contact with students. On the other hand, the Fifth Circuit Court in *Clear Creek* held that "religious thoughts should not be excluded as irrelevant to public education" and correctly noted the holding by this Court in *Mergens* in which the plurality of this Court stated that:

> ". . . there is a crucial difference between *government* speech, endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."

Rensselaer would submit that the Seventh Circuit Court's holding is in contravention of the essential holding of this Court in *Lee*, i.e., that the *state* must "direct and control" religious speech in order to violate the Establishment Clause. In *Lee* the state decided that religious activity would occur, when the school principal made a decision to have prayer at the school function.

In the instant case the state has never decided that religious activity would occur; instead adopting a content-neutral policy (App. 46a) in which religion is in no instance mentioned. In *Lee* the state selected the religious speaker, the principal having chosen the Rabbi who would give the prayer. In the instant case Rensselaer has never chosen any persons who would enter its campuses and address students. The fact that the local members of the Gideons chose to enter the campus was a decision made by the Gideons, and not by the state. In *Lee* the state advised the speaker as to the content of the prayer to be given by providing a pamphlet with guidelines on prayers at such events. In the instant case the state gave no advice nor counsel to any of the various groups or associations who spoke on the campuses as to the content of their material.

Rensselaer did not advise representatives of 4-H, Boy Scouts of America, Tri-Kappa Sorority, Girl Scouts of America, Summer Athletics, Readathon, Marathon, Daughters of the American Revolution History Essay Contest, nor the Gideons as to the content of their messages. Consequently, the circuit court's conclusion that Rensselaer has engaged in a "governmental foray into religious activity" is incorrect. Rensselaer's understanding of its role as a school corporation is that it may not censor speech based upon its content.

Rensselaer has extended benefits by its community literature distribution and access policy to all persons in the community who wish to come to its campuses without singling out religious groups or individuals, who have as members of a broad class of beneficiaries defined by clearly secular criteria under the school board's policy, decided to avail themselves of these extended benefits.

In *Clear Creek* the Fifth Circuit emphasized that its understanding of *Lee* was that the activity in question must be "government-mandated" or "state-initiated." The distribution of Gideon Bibles by community resi-

dents in the Rensselaer schools was neither government-mandated nor state-initiated. Rensselaer would respectfully submit that the Seventh Circuit Court of Appeals' interpretation of *Lee* was in error, emphasizing as it did, the action and activity of private speakers and concluding as it did, that Rensselaer must now censor and prohibit private speakers with a religious message from its campuses.

## III. THE DECISION OF THE SEVENTH CIRCUIT MANDATING DISCRIMINATION AGAINST PRIVATE RELIGIOUS SPEECH CONFLICTS WITH THE DECISIONS OF THIS COURT CONCERNING NON-PUBLIC FORA.

Rensselaer maintains that in its December, 1969 community literature distribution and access policy it created a limited public forum under *Perry Educational Association v. Perry Local Educators Association*, 460 U.S. 37, 45-49, 103 S. Ct. 948, 954-957, 74 L. Ed. 2d 794. Though Rensselaer was under no obligation to open its school campuses and classrooms to the community, and though it is not under any obligation to keep them open for any set length of time, it is restricted by the same standards which apply to a traditional public forum as long as the designated public forum continues to remain a designated public forum. See *Perry*, 460 U.S. at 46.

This Court has concluded that "(c)ontrol over access to a non-public forum can be based on *subject matter* and *speaker identity* so long as the distinctions drawn are *reasonable* in light of the purpose served by the forum and are *viewpoint-neutral*." *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 806 (1985) (emphasis added). In addition, the *per se* exclusion of a religious perspective is *viewpoint-discriminatory*. *May v. Evansville-Vanderburg School Corporation*, 787 F. 2d 1105, 1114 (7th Cir. 1986) (discrimination against religious speech is restriction on a particular point of view). Had the Rensselaer written policy in-

cluded the statement that all speech from community groups would be welcomed, except for religious speech, the policy would be unconstitutional on its face, because it would be content-based. *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Mergens* would lend credence to the concept that there is no reasonable basis for the *per se* exclusion of speech based upon its religious content by private parties in school facilities available for use by a variety of outside organizations.[10]

The Second Circuit in *Travis v. Owego—Apalachin School District*, 927 F. 2d 688 (2d Cir. 1991) held that the school district's conduct, regarding speech, once a limited public forum has been created, must be viewpoint-neutral. The court in *Travis* held that if a school district which has opened a limited public forum then censors and prohibits speech based upon its religious content, the Free Speech and Public Forum aspects of the First Amendment have been violated.

Consequently, Rensselaer would submit that the correct Constitutional question is one of Free Speech and Public Forum jurisprudence and not the Establishment Clause. This Court noted in *Mergens* that "(T)he proposition that schools do not endorse everything they fail to censor is not complicated" (p. 2372). Rensselaer has not endorsed religion in its content-neutral policy, it has not

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[10] The circuit court disparages the recitation of community groups and associations by Rensselaer which have entered the campuses under its policy. The circuit court referred to these as "a few isolated, irregular talks by groups such as the Boy Scouts, the 4-H club and a sorority". However, there is nothing in the record to indicate as to how regular or irregular were the speeches given by various community associations. The record is silent on this point. Consequently, the court was incorrect in arriving at this conclusion. In addition, the point obviously is that under the content-neutral policy adopted by Rensselaer, a significant number of groups, of various types and with different interests, have appeared on the campuses and distributed their literature. The circuit court failed to give any jurisprudential basis for its opinion that the number was too "few" to meet Constitutional standards.

established a religion in its practices, and, in fact, has an obligation *not* to discriminate against religious speech in circumstances in which secular speech would be allowed, such as the use of its campus facilities by various community groups, as set forth in detail above.

## IV. THE DECISION OF THE SEVENTH CIRCUIT, IF ALLOWED TO STAND, WOULD ERECT AN ABSOLUTE WALL OF SEPARATION BETWEEN STUDENTS IN STATE-RUN SCHOOLS AND RELIGIOUS PERSONS WITH RELIGIOUS MESSAGES AND VALUES, CONTRARY TO THE OPINIONS OF THIS COURT.

The circuit court's opinion, if allowed to stand, would strike at the very heart of this Court's Establishment Clause cases in which the Court has promoted "pluralism" and decried efforts by some to force the state to remove all traces of religion from public life. Justice Douglas in *Zorach v. Clauson*, 343 U.S. 306 (1952) emphasized that when the state encourages religious activities "it follows the best of our traditions." He noted that there is no requirement in the Constitution that the state "show a callous indifference to religious groups." (p. 658). Justice Goldberg, joined by Justice Harlan, wrote in *Abington School District v. Schempp*, 374 U.S. 203 (1963):

> "It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can only lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, *but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.* Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it." (p. 306—emphasis added).

Justice Berger in *Walz v. Tax Commissioner*, 397 U.S. 664 (1970) wrote:

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts *there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.*" (397 U.S. at 669—emphasis added).

Rensselaer would submit that neither its policy nor its practice by which it has opened its campuses to members of the community is a sponsorship nor an establishment of religion. On the contrary, Rensselaer would submit that the circuit court's opinion requiring it to prohibit speech coming on to its campuses under its literature distribution and access policy is hostile to religion, would constitute censorship and would itself be a violation of the First Amendment.

Rensselaer is concerned that should the circuit court's opinion stand, that the result would be the creation of "an absolute wall of separation" between its students and religious speakers with religious values and messages, sending "a clear message of disapproval", as Justice Kennedy warned in his dissent in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 106 L. Ed. 2d 472 (1989). Justice Kennedy warned against efforts to forbid all religious activity in public life as "a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause." (p. 657).

What else could the students of Rensselaer conclude from this locally well-publicized case, except that the government of their nation is about to allow any community group to address them in their classrooms and to give them literature, unless of course they are "religious" and therefore illegal, even unconstitutional, and thus, to be

scorned. The facts of this case confirm that no student was ever coerced to support or participate in any religion or its exercise. No religious exercise took place in which a student was required to participate, nor is there anything in the record to show that any student was coerced into engaging in any activity of any sort whatsoever. The mere invitation to students by a private speaker to accept, or for that matter reject, literature distributed free by the private speaker, hardly constitutes either state action or a state imprimatur of the literature itself, as the district court found (App. 42a)

Contrary to the conclusion of the circuit court, Rensselaer would submit that its eleven year old students are quite capable of understanding that the school is not endorsing, nor promoting, let alone *compelling*, its students to enter into the various art contests, scouting activities, history contests, agricultural activities, Christianity or Judaism, club membership, or any of the other activities which it allows under its literature distribution and access policy.

## CONCLUSION

For all of the reasons as set forth herein, and because of the Seventh Circuit's clear departure from the decisions of this Court, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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March 26, 1993

# APPENDICES

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 91-2279

JOSHUA H. BERGER and MORIAH H. BERGER,
b/n/f ALLEN H. BERGER,
*Plaintiff-Appellants,*

v.

RENSSELAER CENTRAL SCHOOL CORPORATION,
*Defendant-Appellee.*

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Argued Oct. 21, 1992

Decided Jan. 5, 1993

Order Amending Opinion Feb. 17, 1993

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Franklin A. Morse, II (argued), Barnes & Thornburg, South Bend, IN, Richard A. Waples, Indianapolis, IN, for plaintiffs-appellants.

Robert K. Skolrood, Nat. Legal Foundation, Virginia Beach, VA, John R. Price (argued) Indianapolis, IN, Jay A. Sekulow (argued) American Center for Law and Justice, Virginia Beach, VA, for defendant-appellee.

Joel H. Greenburg, Chicago, IL, Samuel Rabinove, American Jewish Committee, New York City, for amici curiae American Jewish Committee, Nat. Council of

Churches of Christ in U.S., Unitarian Universalist Ass'n, American Jewish Congress and Americans United for Separation of Church and State.

Richard E. Shevitz, Hopper, Wenzel & Galliher, Sheila Suess Kennedy, Rubin & Levin, Indianapolis, IN, Steven M. Freeman, Anti-Defamation League of B'Nai B'Rith, New York City, for amicus curiae Anti-Defamation League of B'Nai B'Rith.

Richard E. Shevitz, Hopper, Wenzel & Galliher, Sheila Suess Kennedy, Rubin & Levin, Indianapolis, IN, for amicus curiae Indiana Interreligious Com'n on Human Equality.

Richard J. Darko, Lowe, Gray, Steele & Hoffman, Indianapolis, IN, for amicus curiae Indiana State Teachers Ass'n.

Peggy M. Hodges, American Family Ass'n, Tupelo, MS, for amicus curiae American Family Ass'n, Inc.

Robert K. Skolrood, Brian M. McCormick, Nat. Legal Foundation, Virginia Beach, VA, for amicus curiae Nat. Legal Foundation.

Keith A. Fournier, American Center for Law and Justice, Virginia Beach, VA, for amicus curiae American Center for Law and Justice.

Before CUMMINGS, Circuit Judge, PELL, Senior Circuit Judge, and KAUFMAN, Senior District Judge.*

CUMMINGS, Circuit Judge.

People are accustomed to finding Gideon Bibles tucked in the drawers of their hotel rooms; much less frequently do they find them stashed in the desks of their public school classrooms. In Rensselaer, Indiana, however, representatives of Gideon International have distributed

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* The Honorable Frank A. Kaufman, Senior District Judge in the District of Maryland, is sitting by designation.

Bibles in the public schools—usually in classrooms—for so many years that no one can seem to remember when the practice began. Moriah H. Berger and her brother Joshua are students in schools operated by the Rensselaer Central School Corporation ("Corporation"). Moriah was seven years old and in the first grade at Monnett Elementary School in May 1990 when plaintiffs filed an amended complaint challenging the Corporation's association with the Gideons. Joshua was ten years old and enrolled in the fifth grade at Rensselaer Central Middle School. The father of these children, Allen H. Berger, brought this suit on their behalf seeking to have the Corporation's practice declared an unconstitutional violation of the First Amendment's directive that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The district court threw out the Bergers' suit on summary judgment.

Though briefs in this case were first filed eighteen months ago, oral argument was postponed because the Supreme Court had on its docket the case of *Lee v. Weisman*, —— U.S. ——, 112 S.Ct. 2649, 120 L.Ed.2d 467. It is clear from the tenor of the initial briefs of both parties as well as from the numerous *amici* submissions in our case that, among those who follow such trends, the Supreme Court had been expected to work a radical change in Establishment Clause jurisprudence to allow more state involvement with religion. Defendants quoted as an expert source none other than *The Washington Post* for the proposition that *Lee* might "lead to an historic ruling which would 'allow a greater role for religion in public life'" (defendant's brief at 25). Defendant's brief discussed the expected shift anxiously, almost gleefully, because the prevailing precedent, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, was highly unfavorable to its position. However, the Supreme Court in *Lee* did not accept the invitation issued by the Solicitor

General and others to give the government greater freedom to inject religion into its activities and policies. *Lee*, —— U.S. at ——, 112 S.Ct. at 2655. Instead, the Court left *Lemon* untouched, and created an equally vigilant Establishment Clause precedent by outlawing the practice of Providence, R.I. public schools of inviting clergy to deliver nonsectarian prayers at graduation ceremonies.

As a result, we must continue to view with suspicion governmental forays into religious activity, particularly in the context of public schools. The relationship between the Corporation and the Gideons cannot survive this scrutiny. Under the principles enunciated in *Lemon* and *Lee*, the distribution of Bibles in Indiana schools offends the First Amendment of the Constitution, and we are compelled to reverse the district court, 766 F.Supp. 696.

I.

The Rensselaer Central School Corporation has a written policy allowing the superintendent of schools and the principal of a given institution to grant permission to members of the community who wish to distribute literature or other publications to students.[1] This policy ap-

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[1] The policy reads as follows:

5501.1 In the best interest of the student body, no person, group, or other organization shall distribute, display, or exhibit any book, tract, map, picture, sign, or other publication of any type on the Rensselaer Central School Corporation premises unless authorized by the superintendent and the building principal.

5501.2 Approval for the distribution, display or exhibit of any materials by any persons, group, or organizations not sponsored by the school must be cleared 72 hours (three (3) school days) in advance of any distribution, display, or exhibit through the superintendent and the building principal[']s offices. If permitted, the time and location of distribution, display, or exhibit is to be determined by the administration. * * *

5505.5 Any person, group, or organization not a part of the Rensselaer Central School Corporation[] that does not abide

pears to give a principal, in conjunction with the superintendent, total discretion to grant or deny access to school property. Yet the policy offers the principal and superintendent no guidance on how to exercise this discretion other than the general reminder to act in students' best interests. It does not tell school officials whether they may favor certain speakers because some messages are more appropriate for children than others. Nor does the policy tell the superintendent or principal whether presentations and distributions by non-school personnel may be made during times ordinarily reserved for instruction. The policy does not say, for example, whether school officials could allow a local clothes merchant into the classroom one afternoon to peddle this or that brand of jeans in place of the usual algebra lesson—or whether the principal's cousin could come in and hand out leaflets pitching his candidacy for mayor.[2]

By all accounts, such difficult cases did not arise in Rensselaer except for the distribution of Gideon Bibles, and there were no disputes under the policy until Mr. Berger protested to the Corporation that he did not think it appropriate for his children and other students to receive religious material in the public schools.[3] In 1985,

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by the above policy, at the request of school officials, shall be considered guilty of trespass and reported to local civil authorities.

5505.6 Questions concerning the distribution of materials on school premises that are not answered by the above policy shall be presented to the Board of School Trustees for clarification.

[2] It is a measure of the policy's flexibility that what could be considered a simple trespass statute has been used to allow a religious group to distribute Bibles during class time.

[3] The policy itself does not treat religion directly and, thus, on its face, raises no Establishment Clause concerns. The Bergers raised an as-applied challenge to the Corporation's practice of allowing Gideon representatives to distribute Bibles to fifth graders. This opinion uses "policy" and "practice" interchangeably to refer to the Corporation's actions toward the Gideons.

when Joshua was in the first grade, he and the other youngsters were given a publication called *My Favorite Book* that was published by the "Jesus' Love Foundation" in conjunction with several local shopkeepers. In the elder Berger's opinion, the book was nondenominational but religious in its treatment of citizenship and lifestyle. Though he expressed disbelief to his wife that such materials would be distributed in public schools, Mr. Berger did not protest to the Corporation. In 1989, however, Mr. Berger learned of the Rensselaer school policy permitting the Gideons to distribute Bibles (Berger dep. at 8-16, plaintiffs' app. at 323-331). On October 27, 1989, he sent a letter to Superintendent Roberta Dinsmore requesting an end to the practice. Mr. Berger, who is a professor of anthropology, said that the relationship between public schools and the Gideons "is in clear violation of constitutional principles mandating a separation of church and state" (plaintiffs' app. at 375). The letter was discussed at a meeting of the school board on December 19, 1989. The president of that body, in raising the issue for the first time, also pronounced its resolution by declaring that the board had decided not to alter its policy regarding the Gideons. According to the minutes of the meeting, the president said:

> "Around November 1, the Board of Education received a letter questioning the legality of allowing the Gideons to pass out Bibles to the 5th grade students. Since that time a great deal of research has gone into the subject. The Board has had contact with a number of organizations across the United States and has, through this contact, come to a conclusion. I will briefly mention some of the information which we received. First, there have been very few actual cases involving the Gideons['] distribution of Bibles in the Public Schools. * * * At this time it is illegal to pass out Bibles in New Jersey and the eastern part of Arkansas. The Supreme

> Court has heard none of these cases. An important fact is that none of these cases have any jurisdiction in our own State which is in the 7th Judicial Circuit. Therefore, our policy concerning distribution, display or exhibition of materials on schools premises remains unchanged."

(plaintiffs' app. at 531). The audience was then invited to speak; all but one person voicing an opinion supported the existing policy. *Id.* Nothing said by the citizen commentators prompted the school board to change its mind, and the president's remarks reprinted above represent the school board's only public discussion of this issue.

Though Mr. Berger's letter did not sway the school board, it did scare off the Gideons. According to a representative of the organization, its policy is to sidestep litigation by avoiding schools where it meets strong opposition (Kooy dep. at 8, plaintiffs' app. at 728). Thus the Gideons withdrew their offer to supply Bibles during the 1989-1990 school year, at least temporarily ending a practice that extended back thirty-five years or more. As a result, neither Joshua nor Moriah Berger actually received a Bible from the Gideons.[4]

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[4] Defendant argued in the district court that the Bergers did not have standing to challenge the school policy because neither Joshua nor Moriah had received Gideon materials. The practice had been to distribute Bibles to fifth graders. Because the Gideons canceled their offer to distribute Bibles during the 1989-1990 school year when Joshua was in the fifth grade, he did not receive religious literature, and Moriah is still several years shy of the fifth grade. The district court decided that plaintiffs did have standing—in large measure because, having affirmed its policy, the school board could renew the allegedly wrongful activity at any time. In fact, the principal of the Rensselaer Central Middle School refused to say in his deposition how he would treat further requests by the Gideons (Lewis dep. at 33-34, plaintiffs' app. at 651-652). Defendant does not challenge the district court's findings on standing in this appeal, and we need not reconsider the issue in any detail except to note that Judge Sharp decided the question correctly.

When the Gideons did distribute Bibles, they sent two representatives who came once a year after clearing a date with the principal. There was no set method of distribution. However, the men usually went to each of five classrooms of fifth graders, always during regular school hours. They spoke for a minute or two about their organization—their exact statements are not in the record —and offered up a painful pun that the books, the covers of which were red, were meant to be read. We take this to mean that the Gideons made at least some statements to students encouraging them to read the Bible. After the presentation, the students were instructed to take a Bible from a stack of Bibles placed on a table or desk. During certain years the Bibles were distributed not in classrooms but in the auditorium or gymnasium, or perhaps the hallway. On such occasions the fifth graders were assembled in the auditorium or gymnasium for the short presentation by the Gideons.

The teachers, though present, did not participate in handing out the Bibles. At times the principal also attended. The students were frequently told to take the publications home to their mothers and fathers and to return the books to their teachers if their parents objected. It is unclear from the record how often this happened, if at all, or by what mechanism the teachers returned Bibles to the Gideons. For some years the school asked students to obtain the signed permission of a parent before accepting a Bible. This practice ended several years ago. Neither the principal nor superintendant gave a reasoned explanation for abandoning permission forms. Apparently school officials did not expend much energy thinking about how the Gideons were to distribute Bibles, or the implications of that distribution. Indeed, a school board member told Mr. Berger that it had never occurred to him anyone might object, and indeed no one other than Mr. Berger ever complained about the relationship between Rensselaer schools and the Gideons (Berger dep. at 22, plaintiffs' app. at 337).

The Bibles given students in Rensselaer school contained the entire New Testament but only the books of Proverbs and Psalms from the Old Testament. One student testified by affidavit that the Bible she received contained a blank space for a signature under the written statement, "My Decision to Receive Christ as My Savior" (plaintiffs' brief at 11). In most other Bibles, however, the front page of the Bible merely had blank lines under "Presented to," followed by the Gideons' address in Nashville. The next page contained a red, white and blue drawing of an American flag and a quote from Proverbs 14:34: "Righteousness exalteth a nation: but sin is a reproach to any people." On the title page was the statement, "The New Testament of Our Lord And Savior Jesue Christ With Psalms and Proverbs * * * Commonly Known As The Authorized (King James) Version * * *." By all accounts, the Bibles were not used for pedagogical purposes. The teachers did not discuss religion in conjunction with the distribution, and the Bibles were not studied for their historical or literary value. They were presented simply as a gift from the Gideons to be read daily for personal enrichment.

The Gideons were not the only group to take advantage of the Corporation's open-door policy. According to defendant, the Boy Scouts, Tri-Kappa Sorority, the 4-H Club and other unnamed groups have at various times addressed students in Rensselaer schools (defendant's brief at 4-5). In addition, these groups and others circulated parental permission forms for participation in their extracurricular activities, and the Jesus' Love Foundation handed out a religious publication entitled *Young People of the Bible* in addition to the nondenominational *My Favorite Book*, which Joshua Berger received in the first grade (defendant's brief at 5-6). The record contains but one example of school officials exercising their discretion to deny access to outsiders. The superintendent rejected for unspecified reasons a poster

that was to be pinned on a bulletin board. The superintendent said in her deposition only that the poster was not what she had expected (Dinsmore dep. at 25-27, plaintiffs' app. at 451-453). Asked the sorts of presentations that would not be permitted in her schools, the superintendent said that she would exclude promoters of "satanism" because "we are responsible for protecting the moral being of the kids." The superintendent seemed to leave room for rejecting other groups as well. When questioned if "[i]n concrete, terms, other than satanists, is there any other religious oragnization or anti-religious organization that you can think of at this time that you would put in the category of those whose material you would not approve?" she said merely, "I do not know all their names, no" (Dinsmore dep. at 74-75, plaintiffs' app. at 500-501).

II.

Attempting a definitional coup, defendant tells us at page 15 of its brief that this is not, after all, a case about the Establishment Clause but a case about free speech. The issue is said to be the right of Gideons to freely express themselves by handing out Bibles to schoolchildren. Specifically, the Corporation suggests that Rensselaer schools created a designated public forum under *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49, 103 S.Ct. 948, 954-957, 74 L.Ed.2d 794, by issuing an open invitation to speakers in the community to address schoolchildren. Having opened otherwise non-public property to expressive activity, the government is supposedly obliged to treat all speakers equally. To exclude the Gideons, then, would be to discriminate based on the content of their message (defendant's brief at 15-21). Under this analysis, we need not even consider whether the government has established a preference for one religion over another, or for religion in general, by overseeing the distribution of Gideon Bibles in classrooms for non-pedagogical purposes.

This approach suffers from two failings: it distorts the facts and misconstrues the law. It is factually wrong on two counts. First, the free speech argument presumes that the Corporation did not participate in the Bible distribution. In essence, this is an argument that the distribution of Gideon Bibles lacked state action. Under this view, the Corporation was merely a conduit or neutral non-participant through whose doors ideas could pass without changing or being changed by the schools' participation. Several key facts belie the schools' non-involvement. The Bibles were distributed by Gideons—it is true—but in public schools, to young children, in classrooms, during instructional time,[5] each year for several decades, in the presence of the teacher and often the principal, with instructions to return unwanted books not to the Gideons but to teachers. Defendant carefully notes that the distribution sometimes occurred in an auditorium as evidence that it was not part of a state-sponsored effort to indoctrinate students in the ways of the New Testament, presumably because distribution in auditoriums, as against distribution in classrooms, is less suggestive of state-sponsored Bible study. Yet the image of hundreds of students being marched into an auditorium for the yearly distribution of Bibles cannot but leave the imprimatur of state involvement. A ten- or eleven-year-old fifth grader cannot be expected to make subtle distinctions between speakers or instructors invited by the Corporation and those whose invitations are self-initiated, even assuming the children were told how the

[5] The superintendent contended that the Bibles did not take up instructional time because there are a few extra minutes built into the school day (Dinsmore dep. at 71-72, plaintiffs' app. at 497-498). While it is unquestionably true that there must be unbudgeted minutes in a school day, and that the short presentation by the Gideons did not necessarily replace other instruction, the important point is that the distribution occurred during regular school hours ordinarily reserved for teaching. We do not take the superintendent to mean that students and teachers would have sat in silence for that period had the Gideons not come to distribute Bibles.

Gideons arrived in their classrooms—and there is no evidence that they were so informed. *Lee v. Weisman*, —— U.S. ——, ——, 112 S.Ct. 2649, 2657 ("These concerns have particular application in the case of school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject"). It would be naive in the extreme to draw any conclusion in these circumstances other than that the Corporation was intimately involved if not downright interested in seeing that each student left at the end of the day with a Gideon Bible in his or her pocket.

The free speech argument also errs factually by depicting the Rensselaer schools as truly open fora for community speech. After combing the history of Rensselaer schools for examples of such speech, defendants could find just a few isolated, irregular talks by groups such as the Boy Scouts, the 4-H Club and a sorority. Moreover, the record is barren of addresses or literary distributions by political groups or religious organizations other than the Gideons. The only exceptions were books entitled *My Favorite Book* and *Young People of the Bible* printed by the Jesus' Love Foundation and a few local merchants. In any event, it is clear that Rensselaer schools—despite the open policy—were not overrun with members of other religions vying for the students' faith. It is dubious whether public schools could or should be used for such purposes, but the salient point here is that Rensselaer school classrooms were not, in fact, open and active fora for competing ideas, contrary to assertions by the Corporation.

One other factual point is worth noting. Defendant contends that as a neutral arbiter of a neutral policy, it could not exclude the Gideons without engaging in content discrimination. Yet by the superintendent's own admission, she did exercise discretion to exclude at least one publication and had every intention of excluding

other groups she found objectionable, including "satanists" and other unnamed organizations offensive to the "moral being" of children. School officials cannot retain discretion over content on the one hand and on the other pretend to be manacled by the dictates of content neutrality.

Defendant offers *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440, for the proposition that, having unlocked its classrooms for public use, it is required to keep the invitation open to all, including the Gideons. In *Widmar*, the Supreme Court held that a university could not exclude a religious organization from after-school use of its facilities after allowing non-religious groups similar access. Yet *Widmar* differs from this case in one critical respect: the religious group in *Widmar* sought access to classrooms after school, the Gideons seek access to classrooms during school. In other words, the organization in *Widmar* sought access to public school *facilities*. The Gideons, by contrast, are not particularly interested in public school classrooms for their physical properties; indeed, it is doubtful that they would seek access to classrooms were they not populated by young children. There was no captive audience in *Widmar*—the classrooms were empty.[6] In Rensselaer schools, however, children have no choice but to sit through the Gideons' presentation and distribution of Bibles. Even if we were to accept defendant's patently unrealistic assertion that the fifth grade students at Rensselaer Central Middle School did not feel coerced to accept and read the Gideon version of the Bible, they were still urged by Gideon representatives to study the Christian Bible. Defendants does not discuss this issue

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[6] The same analysis applies to *Board of Educ. of Westside Community Schools v. By and Through Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191, in which the Supreme Court held that public schools, having opened up classrooms for after-school use by student organizations, could not deny access to a student-led religious group.

in its brief, and at no point in the record does any school official suggest that students were free to leave the room during the Gideons' talk or to skip the school assemblies at which Bibles were distributed.

The only reason the Gideons find schools a more amenable point of solicitation than, say, a church or local mall, is ease of distribution, since all children are compelled by law to attend school and the vast majority attend public schools.[7] That the Gideons seek access to children and not facilities, as in *Widmar*, is self-evident. It is all the more odd, then, to analyze this case in terms of public forum jurisprudence. A designated public forum is a place. Children, of course, are not. Nor does it follow that, having opened a child's mind to one "use," the child's mind must be open to all uses. Even the slightest consideration should yield the conclusion that public school officials entrusted with the education of youngsters can never give up total control over the content of what transpires in classrooms, not least because the children are a captive audience. If they don't like what they see or hear, they are most assuredly not free to get up and leave. This is not a situation like that in *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284, where courthouse visitors could simply avert their eyes from an offensive message displayed on the back of a jacket. We do not expect young children to put cotton in their ears and scrunch up their eyes to avoid overtly religious messages by the state. See *Lee*, —— U.S. at ——-——, 112 S.Ct. at 2659-2660 (student may not be forced as conscientious objector to skip graduation ceremony). Imagine that the Gideons came to Rensselaer schools not once a year but every morning to lead students in prayer.

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[7] It may be that the Gideons also prefer schools because it gives the Bible distribution an official quality. Some students may be confused and think that Bible reading is a homework assignment (though, given what we know about children of middle school age, it is uncertain whether this would make students more or less likely to read the Scripture).

Is there any doubt that such morning prayers would be impermissible under *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, and *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, no matter that the prayers were led by non-school employees? Recall that, in *Abington*, the Court rejected the daily recitation of the Lord's Prayer even though students could be excused from the classroom.

The analogous decision is not *Widmar* but *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649, in which non-school employees made use of the public schools to further religious doctrine. There the public schools in Champaign, Illinois allowed Jewish, Catholic and Protestant instructors to teach religious classes for a few hours each week during normal school time. Students could choose to sit in on religious classes or to remain in non-religious classes but, having chosen religious instruction, attendance was mandatory. The Court struck down the practice, saying:

> "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State."

*Id.* at 212, 68 S.Ct. at 465; see also *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (striking down program in which publicly paid teachers taught secular subjects at private religious schools). As in *McCollum*, the Gideons used Rensselaer's tax-supported public schools relying on the state's compulsory public school machinery, to disseminate religious material to fifth graders.

Defendant is also wrong as a matter of law that the First Amendment interest in free expression automat-

ically trumps the First Amendment prohibition on state-sponsored religious activity. The reverse is true in the coercive context of public schools. Even in *Widmar*, where the Supreme Court found that the public university had violated the speech rights of religious organizations by denying them access to after-school classrooms, the Court scrutinized the policy under *Lemon* to make certain it did not violate the Establishment Clause. *Widmar*, 454 U.S. at 270-275, 102 S.Ct. at 274-277. The Court found that opening the university's facilities to religious organizations would have a secular purpose, would not entangle the state with religion, and would not have the primary effect of advancing religion. *Id.* Had these conditions been violated, the Court would have been compelled under *Lemon* to uphold the exclusion of religious groups from university facilities. Similarly, the students, teachers and administrators in *Abington* who wished to recite daily prayers in the classroom had a cogent interest in free expression, but the prohibition against establishing a state religion prevailed. *Abington*, 374 U.S. 203, 83 S.Ct. 1560. First Amendment jurisprudence is densely populated with cases that subordinate free speech rights to Establishment Clause concerns. See, *e.g.*, *McCollum*, 333 U.S. 203, 68 S.Ct. 461 (religious instructors may not teach on public school property); *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261 (students and teachers may not recite a state-composed non-denominational prayer); *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed. 2d (striking down a minute of silence for mediation or voluntary prayer); *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (state may not require posting of Ten Commandments in classroom). In each of these cases, people were kept from exercising very real First Amendment rights to, for example, pray or meditate or proselytize. The conflict between free speech and Establishment Clause interests arises because most religious activity necessarily involves expressive activity, and this expression may be stifled in the government's vigilance to

remain neutral toward religion. See *Abington*, 374 U.S. at 222, 83 S.Ct. at 1571. More to the point, the First Amendment is intended to restrict religious activity not by individuals but by the government. As the Supreme Court said in *Engel*:

> "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."

370 U.S. at 435, 82 S.Ct. at 1269. It is only where individuals seek to observe their religion in ways that unduly involve the government that their expressive rights may be circumscribed. In sum, defendant's attempt to wrench this case out of Establishment Clause jurisprudence must fail. A public school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech.

III.

The First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" applies to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213. Because the Rensselaer Central School Corporation acted with state authority in welcoming the Gideons into public schools, its actions are subject to the dictates of the First Amendment. Under the Establishment Clause, the government may not aid one religion, aid all religions or favor one religion over another. *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 15, 67 S.Ct. 504, 511, 91 L.Ed. 711. As the Supreme Court said in *Zorach v. Clauson*:

> "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and

> State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment, within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter."

343 U.S. 306, 312, 72 S.Ct. 679, 683, 96 L.Ed. 954. For the last twenty years the Supreme Court has accomplished the often excruciating task of keeping government and religion apart by a three-pronged test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745. The so-called *Lemon* test has evolved through a series of cases such that a court must inquire (1) whether the government has the purpose of endorsing religion, (2) whether the effect of the government's action is to endorse religion, and (3) whether the policy or practice fosters an excessive entanglement between government and religion. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592, 109 S.Ct. 3086, 3100, 106 L.Ed.2d 472.

As the briefs in the instant case note, *Lemon* has spawned a great deal of jurisprudential controversy, both on and off the Supreme Court. Last term's case, *Lee v. Weisman*, —— U.S. ——, ——, 112 S.Ct. 2649, 2655, explicitly rejected invitations by many parties, including the United States, to scrap *Lemon*. Although the Court resolved the issues in *Lee* without reference to the three-pronged structure of *Lemon*, which would have ordinarily governed the case, *Lemon* remains the law of the land. See *Sherman v. Community Consolidated School Dist. 21 of Wheeling Tp.*, 980 F.2d 437, 445 (7th Cir.1992) (spec-

ulating on the stability of *Lemon* after *Lee*).[8] The Court said that it need not reconsider *Lemon* because of controlling precedents concerning prayer and religious exercise in primary and secondary schools.[9] *Id.* —— U.S. at ——, 112 S.Ct. at 2655. These same precedents, and in particular *Lee* itself, compel us to reverse the district court's decision sanctioning the Rensselaer Central School Corporation's policy toward the Gideons.

In *Lee*, the Supreme Court held that public school principals may not invite clergy to offer invocation and benediction prayers at formal graduation ceremonies for high schools and middle schools without offending the First Amendment. The Corporation's practice of assisting Gideons in distributing Bibles for non-pedagogical purposes is a far more glaring offense to First Amendment principles than a nonsectarian graduation prayer.

The plaintiff in *Lee* was fourteen years old; most of the recipients of Gideon Bibles in Rensselaer were ten- or eleven-year-old fifth graders. Many cases have focused on the impressionability of students in elementary and secondary schools and the pressure they feel from teachers, administrators and peers. See, *e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 584, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510; *Lee*, —— U.S. at ——, 112 S.Ct. at 2658. Expecting a student troubled by religious exercise to object in this setting is unrealistic. *Abington*, 374 U.S. at 288-293, 83 S.Ct. at 1606-1609 (Brennan, J., concur-

[8] Our recent decision in *Sherman* is otherwise inapplicable. In that case we upheld an Illinois statute allowing, but not mandating, that students recite the Pledge of Allegiance. Our narrow decision in *Sherman* found that in the peculiar circumstances of the Pledge, the words "Under God" did not convert its civic character to a religious one, and so did not trigger Establishment Clause analysis. Because the distribution of Gideon Bibles is unquestionably religious, *Sherman* is irrelevant to this inquiry.

[9] The Court has decided Establishment Clause cases before *Lee* without relying on *Lemon*. See, *e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604.

ring). Indeed, the Supreme Court in *Lee* distinguished *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019, which upheld the practice of beginning legislative sessions with a prayer, because a legislature cannot be compared to a school. *Lee*, —— U.S. at ——, 112 S.Ct. at 2660. If the Supreme Court was concerned about the coercive pressures on fourteen-year-old Deborah Weisman, then we must be even more worried about the pressures on ten- and eleven-year-old fifth graders in Rensselaer such as Joshua Berger.

The invocation and benediction in *Lee* was nonsectarian; the Gideon Bible is unabashedly Christian. In permitting distribution of "The New Testament of Our Lord and Savior Jesus Christ" along with limited excerpts from the Old Testament, the schools affront not only nonreligious people but all those whose faiths, or lack of faith, does not encompass the New Testament. If the government may not promote a nonsectarian prayer in the Judeo-Christian tradition, then surely it may not promote the religious views of one sect. *Everson*, 330 U.S. at 15-16, 67 S.Ct. at 511.

Attendance at the graduation ceremony in *Lee* was voluntary; attendance at Rensselaer schools during the Gideon distribution was mandatory. The defendant in *Lee* argued that students could not feel coerced because they needn't attend commencement exercises at all. Justice Kennedy's opinion found this argument wanting. "Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point * * * for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." —— U.S. at ——, 112 S.Ct. at 2659. Unlike the students in *Lee* who had at least a Hobson's choice, the fifth graders in Rensselaer schools had no choice at all. The record does not indicate whether students were told when the Gideons would address them.

Even if they were, the Constitution cannot tolerate a policy that forces conscientious objectors to skip their lessons, break mandatory attendance rules, and evade truant officers. As noted, Rensselaer schools made no provision to excuse from class students who did not wish to hear the Gideons urge them to study the New Testament. And as the Court said in *Lee*, standing silent during an invocation, "though subtle and indirect, can be as real as any overt compulsion * * * [because] for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer. * * * What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it." *Id.* —— U.S. at ——, 112 S.Ct. at 2658. Rensselaer students had similarly unavailing methods by which to dissent. They could have chosen not to accept a Bible or to return it later, but this form of dissent is insufficient, as the fifth graders were compelled to sit through the Gideons' presentation. Moreover, the act of accepting a Bible in front of other students, with the option of returning it later privately or choosing not to read it, signals accord with the Gideons' beliefs. Presumably, the fifth graders could make a public show of not accepting the Bible, just as students could walk out of the graduation ceremony in *Lee*, or leave during the scriptural reading in *Abington*, but the First Amendment prohibits the government from putting children in this difficult position.

The prayer in *Lee* occurred during an after-school extracurricular event; the Gideons distributed Bibles during instructional time. This distinction is critical because it is likely that youngsters in Rensselaer were confused about whether the Corporation endorsed the Gideons' beliefs. This is so because one does not ordinarily associate public schools with Bible distributions. Graduation exercises, by contrast, are the sort of public gatherings that traditionally commence with a prayer or invocation.

The students in *Lee* had undoubtedly attended other ceremonies outside of school which had been preceded by prayers, and the fact that the schools invited clergy of different faiths made it less likely that the graduates would be uncertain whether the school district agreed with the rabbi's message. The Gideons, however, were the sole religious group ever to address Rensselaer students and their version of the Bible was the only one distributed. That the Gideons made this appearance annually in no way softens the perception that the Corporation endorsed the Gideons' views.

*Lee* leaves little room for public schools to teach or promote religion, and the distribution of Gideon Bibles cannot fit in these restrictive confines. In so holding, we have taken our lead from *Lee* and not relied on the structure of *Lemon*. However, we note that the Corporation's Gideon policy is also unacceptable under *Lemon's* three-pronged inquiry. A statute or policy that fails to meet all three *Lemon* criteria must be struck down as a violation of the First Amendment. See, *e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489, 86 L.Ed.2d 29 (striking down statute for lacking a secular purpose). For all the reasons stated elsewhere in this opinion, which need not be repeated, the Corporation's policy falls on the wrong side of two *Lemon* prongs. Though we are confident the school district's policy is not aimed at promoting the religious values of the Gideons, it does have the effect of sending a message to an objective observer that the Corporation endorses the Gideons' beliefs, and it entangles the government unnecessarily in religious affairs.

Even though the district court decision was rendered before *Lee*, the district judge erred in finding no Establishment Clause violation under *Lemon*. The district judge opined that permitting the Gideons to distribute Bibles was no more offensive than allowing the Little League into classrooms to talk up the National Pastime. Such a conclusion is tone deaf to the Constitution's man-

date that the government must not establish a state religion, and is utterly insensitive to the special concern about coercive influences on impressionable public school children. Thus we would have decided this case in the same way had the Supreme Court never heard *Lee*. That the Court so forcefully rejected nondenominational commencement prayers in the public school context only strengthens our judgment that the Gideons may not distribute Bibles in Rensselaer public schools during class time for non-pedagogical purposes. The district court's decision is reversed.

## APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

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JOSHUA H. BERGER, MORIAH H. BERGER,
by Next Friend ALLEN H. BERGER,
*Plaintiffs*

v.

RENSSELAER CENTRAL SCHOOL CORPORATION,
*Defendant*

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May 7, 1991

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*Franklin A. Morse, II, Barnes & Thornburg*, South Bend, Indiana, and *Richard A. Waples*, Indiana Civ. Liberties Union, Indianapolis, Indiana, for plaintiffs.

*John R. Price*, Indianapolis, Indiana, for defendant.

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*Order on Cross Motions for Summary Judgment*

ALLEN SHARP, Chief Judge.

In this action the plaintiffs charge the defendant school corporation with the unconstitutional distribution and dissemination of religious material in violation of the first and fourteenth amendments to the Constitution of the United States. The plaintiffs are elementary school students enrolled in the Rensselaer Central School Corporation, a municipal corporation organized and existing under the laws of the State of Indiana. Pursuant to Fed.R.Civ.P. 17(c), the plaintiffs, by their next friend (their natural father, Allen H. Berger), seek a declara-

tory judgment and preliminary and permanent injunctive relief. Jurisdiction is premised upon 28 U.S.C. §§ 1331 and 1343 [28 USCS §§ 1331 and 1343], and venue is proper pursuant to 28 U.S.C. §§ 94(a)(3) and 1391 [28 USCS §§ 94(a)(3) and 1391].

I.

Both parties have moved for summary judgment under Fed.R.Civ.P. 56. The standards a court employs in reviewing a motion for summary judgment are well-established. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists if there is "sufficient evidence favoring the nonmoving party for a [reasonable] jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *See also La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 905 (7th Cir.1990). The movant bears the burden of establishing that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Becker v. Tenenbaum-Hill Associates, Inc.*, 914 F.2d 107, 110 (7th Cir.1990). The movant may meet its burden by showing that "there is an absence of evidence to support the nonmoving party's case." *Id.*, quoting *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554. Any doubt regarding the existence of a genuine issue of material fact must be resolved in favor of the nonmovant. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513-14.

If the moving party meets its burden, the nonmovant then must present specific facts showing that there is a

genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). The nonmovant cannot rest on mere allegations without significant probative evidence in support of his claim. Accordingly, the nonmovant is required to go beyond the pleadings, affidavits, depositions, answers to interrogatories and admissions on file to designate specific facts showing a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553. For the following reasons, the court hereby GRANTS defendant's motion for summary judgment.

II.

When the amended complaint was filed in May 1990, the plaintiff Joshua H. Berger ("Joshua") was ten years of age and enrolled as a student in the fifth grade at the Rensselaer Central Middle School, a school owned and operated by the defendant school corporation (Complaint at ¶ 4). The other plaintiff, Moria H. Berger ("Moriah"), was seven years old and a first grader in the Monnett Elementary School, also within the defendant school district (*Id.*). Their complaint challenges a duly adopted policy of the school corporation concerning the distribution, display and exhibition of materials on school premises. In pertinent part, that policy provides:

> 5501.1 In the best interest of the student body, no person, group, or other organization shall distribute, display, or exhibit any book, tract, map, picture, sign, or other publication of any type on the Rensselaer Central School Corporation premises unless authorized by the superintendent and the building principal.
>
> 5501.2 Approval for the distribution, display or exhibit of any materials by any persons, group, or organizations not sponsored by the school must be cleared 72 hours (three (3) school days) in advance of

any distribution, display, or exhibit through the superintendent and the building principal[']s offices. If permitted, the time and location of distribution, display, or exhibit is to be determined by the administration.

. . . .

5501.5 Any person, group, or organization not a part of the Rensselaer Central School [ ] Corporation that does not abide by the above policy, at the request of school officials, shall be considered guilty of trespass and reported to local civil authorities.

5501.6 Questions concerning the distribution of materials on school premises that are not answered by the above policy shall be presented to the Board of School Trustees for clarification.

The plaintiffs allege that the school corporation, acting pursuant to this policy, routinely and unconstitutionally grants permission to religious organizations (especially, the Gideon Society) to distribute religious literature in its elementary and middle schools (Complaint at ¶ 7).[1] Among the religious materials allegedly disbursed were a book entitled "Young People of the Bible" and the Gideon Bible, which is an excerpted compilation from the King James Version of the Christian Holy Bible containing the New Testament and the Old Testament books of Psalms and Proverbs. The school corporation readily acknowledges that representatives of the Gideon organization have annually distributed their Bibles to Rensselaer's fifth grade classrooms "for so many decades that no one can remember when the practice commenced" (Defendant's Memorandum of Law on the Substantive First Amendment Questions at 2).

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[1] It is undisputed that organizations with religious affiliation are but one of the many local groups to have requested and been granted permission to avail themselves of the school corporation's literature-distribution policy. Other such organizations include Tri Kappa, Boy Scouts, Summer Athletics, and 4-H.

The undisputed evidence shows that the Gideons would make one visit per school year to the fifth grade students in the Rensselaer's school system. Although the location of the distribution would vary, sometimes occurring in the classroom, at other times in the gymnasium or in the hallway, the Gideon's routine remained largely the same from year to year. Two Gideon representatives (both men) would come to the school during regular school hours and speak to the students for no longer than a couple of minutes, indicating that Bibles would be made available to students wishing to take a copy. As part of their brief spiel, the representatives would explain who they were, what their organization stood for, and indicate that they had Bibles to distribute free of charge. They would tell a pun that the Bibles were red-covered because they were meant to be read. Then the students would form a queue and file by the two representatives who would hand each student a Bible. Throughout this demonstration, the classroom teacher remained present, although observing silently from another part of the room. At no time would the teacher say anything, or participate in the handing out of Bibles.

At one time, the Gideons would advise students to take the Bibles home to their parents, and if the parents objected, to return the Bibles to their teacher at school. Since then, there had been a school policy of first obtaining parental permission from each child who was to receive a Bible. In recent years, however, permission slips were not used, and there was apparently no other mechanisms used to seek parental permission before students received the Bibles.

According to the complaint, Allen H. Berger first learned of the school's policy regarding the annual distribution of Gideon Bibles in October 1989 (Complaint at ¶ 9). On October 27, 1989, anticipating the impending Bible distribution scheduled for November 2, Berger wrote

to the Superintendent of the School Corporation questioning the constitutionality of the school's practice and requesting that it cease. The superintendent replied on November 17, 1989, that the distribution of Bibles would temporarily be postponed pending the December 1989 meeting of the Board of School Trustees.

At the December meeting the school board voted to reaffirm the earlier practice, the superintendent announcing that " 'our policy concerning distribution, display or exhibit of [religious] materials on school premises remains unchanged.' and that requests for permission to do so would be granted in the same manner as in the past" (Complaint at ¶ 10). Again, in February 1990, during an in-service conference of teachers, the superintendent confirmed that "it was the policy of the School Corporation, receipt of a proper request, to permit the distribution of religious literature and other material by any organization, with the sole exception of 'Satanists' " (Complaint at § 11).

Notwithstanding the defendant's steadfastness in retaining its prior policy, the Gideons never did distribute their Bibles to the classrooms in which Joshua and his contemporaries were fifth grade students at Rensselaer. The school corporation says that Allen H. Berger's frequent objections to the distribution policy resulted in that year's cancellation, with the result that no Gideon Bibles were made available to fifth graders (including Joshua) in the school system during the 1989-90 school year. Because Joshua and his classmates are now sixth graders (to whom the Gideons have never previously distributed their literature in Rensselaer) and because Moriah is only a second grader (at least three years away from receiving a Gideon Bible), the defendants claim that the Bergers lack standing to bring this action. In further support of its motion, the defendant offers the deposition of Gerald Kooy, president of the Jasper County (Indiana) Gideon Society, withdrawing his offer to supply Rens-

selaer school students with Bibles because of the Berger's objections.

The plaintiffs acknowledge that the only religious material Joshua personally received was several years ago when he was in the first grade; although, they claim that other religious literature was recently distributed to some of Joshua's classmates (Plaintiffs' Response to Request for Admissions at 1-4). Joshua claims that as a first grader he received a book entitled "My Farovite Book," published by Good Will, Inc., and distributed in the schools just prior to the Christmas holiday (*Id.* at 1-2). The frontispiece of "My Favorite Book" bears the message "Best Wishes for the Holidays," and states that several local businesses, including the "In Jesus' Love" Foundation, Inc., were responsible for the book's presentation. Its first page reads:

> For this new morning with its light, For rest and shelter of the night, For health and food, for love and friends, For everything that goodness sends, I am thankful.

Plaintiffs refer to this publication as evidence of the school corporation's predilection "to blur the constitutionally protected distinction between secular and religious activity" (*Id.*).

The complaint contains no similar allegation that Joshua's sister (and co-plaintiff) Moriah ever received any religious material from the school. Her avowed nonreceipt of religious literature, in conjunction with Joshua's acknowledgment that he has received no such literature since the first grade and Mr. Kooy's statement rescinding the Gideon Bible distribution, has prompted the school corporation's motion to dismiss this case, pursuant to Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction. The school system argues that this matter fails to present the constitutionally required "case or controversy." Accordingly, before addressing the merits of

plaintiffs' constitutional claim, the court must first consider the justiciability question.

III.

The Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 [28 USCS §§ 2201, 2202], by its terms limits the declaratory remedy to "actual controvers[ies]." The restriction is mandatory, for Article III extends the "judicial Power of the United States" only to actual, ongoing cases and controversies, and not disputes that are hypothetical, academic, or moot. In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941), recounting Chief Justice Hughes's cryptic test of justiciability, the Supreme Court stated that the inquiry is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273, 61 S.Ct. at 512, citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-42, 57 S.Ct. 461, 463-65, 81 L.Ed. 617 (1937).

The modern version of this test of justiciability is that a federal court cannot render an advisory opinion, a plaintiff must have standing, and a court cannot hear a case that is not yet ripe or that has become moot. *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §§ 3529-33 (1984) [hereinafter Wright & Miller]. Although the defendant challenges the justiciability of this action at each prong of the reformulated test, the court agrees with the plaintiffs that this case is justiciable, for it presents a concrete dispute in which the plaintiffs have standing, and the cause of action is ripe and not moot. The court considers each prong in turn.

A.

The facts of this case present a substantial controversy that is "definite and concrete," not hypothetical or ab-

stract. Joshua and Moriah Berger remain students in the defendant school system, the stated policy of which permits the distribution of religious literature in its classrooms, despite plaintiffs' objection that the practice violates their constitutional rights under the first amendment. The court finds that the defendant's current policy, affecting these plaintiffs as currently enrolled students subject to that policy, presents an actual controversy capable of review in this court.

B.

The concept of standing focuses on the question whether the plaintiff is the proper litigant to bring suit. The emphasis is thus on the party and not the claim itself. The Supreme Court has articulated three standing requirements that a plaintiff must satisfy to bring his suit in federal court: (1) he must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (citations omitted); *see also Simmons v. I.C.C.*, 900 F.2d 1023, 1026 (7th Cir. 1990).

With respect to the first requirement—that the plaintiff suffer an actual or threatened injury—the defendant has emphasized its intention to retain the policy permitting distribution of such materials, thereby subjecting both plaintiffs to the prospect of future constitutional injury.

Plaintiffs readily satisfy the second requirement also. Without question, plaintiffs' asserted injury is a direct "but for" cause of the school's corporation's policy. Were it not for the policy and the school's approval of the dis-

tribution of religious literature, there would be no constitutional injury.

Similarly, the complained-of injury is capable of total redress by a favorable decision in this court. Granting plaintiffs' requests for relief would remedy their alleged injury by prohibiting and declaring illegal the defendant's further distribution of religious materials. Plaintiffs thus have standing to maintain this lawsuit.

C.

The ripeness doctrine is another principle of justiciability. It can be viewed as a time dimension of standing, one of maturity to bring suit. It asks, in effect, whether there is yet any need for the court to act. A court may find that a case is not ripe for decision if the asserted injury is too remote or contingent to warrant the present adjudication. *See* Wright & Miller, § 3532.1 at 130.

The Supreme Court has often stated that the test of ripeness turns on the functional considerations of " 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Com'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 1720, 75 L.Ed.2d 752 (1983), quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). *See also Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820, 823 (7th Cir.1990).

The court holds that this matter is ripe for adjudication under the two *Abbott* factors. First, the issues presented are fit for judicial decision because the question presented is almost purely legal. There is little factual dispute about what transpired, or given the school corporation's adherence to its distribution policy, what is likely to transpire. All the court need decide, therefore, is the legal consequence of undisputed factual events that

are well document in this record. And even as to future events, the likelihood of "repeating history" is high given the tradition and regularity of the practice. Consequently, the passage of additional time will not substantially alter the factual record.

Second, because the asserted injury involves the denial of first amendment liberties, withholding review of this matter would work an undue hardship on plaintiffs. *See, e.g., Planned Parenthood Ass'n of Chicago Area v. Kempiners*, 700 F.2d 1115, 1122 (7th Cir. 1983) (Cudahy, J.) ("Requirements of ripeness are less strictly construed in the first amendment context. . . .") (citations omitted); *see also Spartacus Youth League v. Board of Trustees of Illinois Industrial University*, 502 F.Supp. 789, 796-97 (N.D.Ill.1980) ("In the First Amendment area, however, a somewhat relaxed standard . . . is applicable.").

D.

The mootness doctrine is grounded in the same principles of justiciability as standing and ripeness. Like ripeness, mootness is a temporal concept, involving not the maturity of the lawsuit, but its continuing vitality. A case is moot, and therefore nonjusticiable, when it is no longer "ongoing," or where the court is no longer capable of "affect[ing] the rights of litigants in the case before [it]." *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249, 1253, 108 L.Ed.2d 400 (1990) citation omitted). Moreover, the requirement of Article III mandates that a federal court have jurisdiction throughout the litigation, not simply when suit was filed. "The parties must continue to have a 'personal stake in the outcome' of the lawsuit" (citations omitted). Id. 110 S.Ct. at 1254.

The school corporation argues that this lawsuit is moot for a couple of reasons. First, it claims that because neither plaintiff is currrently in the fifth grade, none has a "personal stake" in the controversy. Second, the

defendant maintains that Mr. Kooy's withdrawal of his offer to supply Gideon Bibles to the Rensselaer schools prevents any future constitutional injury from recurring. Both arguments are without merit because the court finds that two exceptions to the mootness doctrine apply to these facts.

The first exception to the mootness doctrine—the "capable of repetition yet evading review" exception—recognizes that some controversies are so short-lived that the total injury will occur before there is an opportunity for full judicial review. Even if the fallout from the constitutional injury is, as defendant claims, limited to students in the fifth grade, a nine-month school year will almost never be sufficiently long even to file pleadings and conduct discovery, let alone fully litigate the merits. In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Supreme Court held that the case remained justiciable even though the petitioner was no longer pregnant. The Court said that was because the normal nine-month pregnancy period made the case "capable of repetition, yet evading review." *Id.* at 124, 93 S.Ct. at 712 (citations omitted). The same reasoning applies in this case to salvage its justiciability.

But this case is justiciable for another reason also, viz., the application of the second mootness exception—the doctrine of voluntary cessation. The Supreme Court has held that "voluntary cessation of allegedly illegal conduct . . . does not make the case moot" (citations omitted). *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). That is because the defendant is free to return to his old ways[].

> This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts

> have rightly refused to grant defendants such a powerful weapon against public law enforcement.

*Id.* (citations omitted). Thus, where a defendant has voluntarily discontinued the challenged conduct, the case will not be deemed moot unless the defendant demonstrates that "there is no reasonable expectation that the wrong will be repeated" (citation omitted). *Id.* at 633, 73 S.Ct. at 897. The school corporation has not made the required showing. It is not enough to plead that the Gideons have said they will not return with their Bibles to the Rensselaer schools. For the distribution of Bibles is not the only asserted constitutional injury. Objections also have been leveled against other kinds of religious material. Indeed, the actual source of the asserted injury lies not with the groups that wish to disseminate their literature but with the school corporation that ultimately grants their requests. Because the school system has indicated that its distribution policy remains unchanged and will continue, its voluntary cessation of the allegedly illegal activity cannot serve to render this case moot. Accordingly, having thus determined that this matter is justiciable, the court proceeds to address the merits of plaintiff's constitutional claim.

IV.

The plaintiffs allege that the school corporation's policy allowing the distribution of religious literature in its classrooms violates the establishment clause of the first amendment. The court briefly reviews the Supreme Court's jurisprudence in this area and applies the relevant precedent to these facts.

A.

The opening words of the Bill of Rights are those of the establishment clause: "Congress shall make no law respecting an establishment of religion. . . ." Although the establishment clause by its terms applies only to fed-

eral government action, the Court has determined that the fourteenth amendment incorporates its provisions to encompass state action also. *Everson v. Board of Education*, 330 U.S. 1, 8, 14-15, 67 S.Ct. 504, 507, 510-11, 91 L.Ed. 711 (1947).

*Everson* is the Court's seminal establishment clause case. In addition to applying the clause to state (as well as federal) action, *Everson* outlined what would become the core establishment clause principle: strict government neutrality toward religion. "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Id.* at 16, 67 S.Ct. at 512 (citation omitted).

*Everson's* doctrine of separation has evolved over the years into a three-pronged test for determining whether governmental action will survive an establishment clause challenge. As the Court stated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive governmental entanglement with religion'" (citations omitted). With only limited revision, the so-called *Lemon* test today remains the constitutionally relevant analysis for establishment clause challenges.

The revision has occurred in the form of a *Lemon*-modified endorsement test. The first suggestion of an endorsement analysis appeared in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), the Pawtucket Rhode Island, creche case. The following year, in *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), the moment-of-silence case, the Court first referred to an endorsement inquiry in a majority opinion. Justice Stevens wrote the majority opinion and began

his analysis with the venerable *Lemon* test. "In applying the purpose test," wrote Stevens, "it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" *Id.* at 56, 105 S.Ct. at 2489 (quoting *Lynch*, 465 U.S. at 690, 104 S.Ct. at 1368 (O'Connor, J., concurring)). He announced the Court's conclusion also in endorsement terms: "The legislature enacted [the statute] . . . for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday. . . . Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Wallace*, 472 U.S. at 60, 105 S.Ct. at 2491.

Concurring in *Wallace*, Justice O'Connor also addressed the purpose prong in endorsement terms, as had Justice Stevens, but she too framed the effect prong in the language of the endorsement test. As to the effect prong, O'Connor offered the same endorsement analysis she had recommended in *Lynch*: "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in the public schools." *Id.* at 76, 105 S.Ct. at 2500 (citations omitted).

Just a month after its decision in *Wallace*, the Court decided *Grand Rapids School District v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), where the Court invalidated government programs under which public teachers taught secular subjects at private religious schools. Justice Brennan wrote the Court's majority opinion, readily acknowledging the "manifestly secular" purpose of these programs, and focusing his analysis on the "effects" prong instead. Brennan found that the government programs could not withstand constitutional scrutiny because they "provide[d] a crucial symbolic link between government and religion." *Id.* at 385, 105 S.Ct. at 3223. He indicated that "an important concern of the effects test is whether the symbolic union of church and

state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices." *Id.* at 390, 105 S.Ct. at 3225. Brennan continued:

> The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state is more likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environmental as much as of free and voluntary choice.

*Id.* (citations omitted).

In *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), the creche and menorah case, Justice Blackmun reaffirmed that since *Lynch* a majority of the Court has viewed the endorsement inquiry as the proper analytical device to evaluate establishment clause challenges. *Id.* 109 S. Ct. at 3103 (quoting *Lynch and Grand Rapids*). And just last Term in *Board of Educ. of Westside Community Schools v. Mergens*, —— U.S. ——, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), a majority of the Court again embraced the endorsement method. *See id.* 110 S.Ct. at 2370-73, 2378-83. Only Justices Kennedy and Scalia expressly disavowed this approach, indicating that the "word endorsement has insufficient content to be dispositive." *Id.* 110 S.Ct. at 2377-78.

The evolution of the traditional three-pronged *Lemon* test into a *Lemon*-modified endorsement test means that a court reviewing the constitutionality of a governmental practice under the establishment clause must now inquire: first, whether the government's actual purpose in performing or permitting the challenged action is to endorse

or disapprove of religion; second, whether the governmental action is sufficiently likely to be perceived by an objective or reasonable observer as an endorsement or disapproval of religion; and third, whether the action fosters an excessive entanglement between government and religion. For the governmental action to withstand an establishment clause challenge, it must satisfy each of the three factors outlined above. Having thus reviewed the Supreme Court's modern establishment clause jurisprudence, the court applies the endorsement test to these facts.

B.

The first inquiry focuses on whether there is a secular purpose to the school corporation's policy permitting the distribution of Gideon Bibles on school premises during school hours. The policy on its face it content neutral; it does not mention a supreme being, the holy scripture, or make any other religious reference. Nevertheless, the Bergers insist that the practice of making the Bibles available to Rensselaer school children indicates that the defendant's actual purpose was to endorse Christianity. The court disagrees. Heeding Justice O'Connor's deferential approach,[2] the court finds that the school's policy was motivated by at least one of many possible secular concerns. One could view the practice as simply a trespass regulation controlling the access of non-school persons or groups onto the school campus during school hours. Or it could be viewed as a program to make available to students locally generated literature reflecting many aspects of their community—civic, athletic, historic, as well as religious. In any event, the court finds

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[2] "Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of a religious belief 'was and is the law's reason for existence.'" *Wallace v. Jaffree*, 472 U.S. at 75, 105 S.Ct. at 2499 (O'Connor, J., concurring in judgment) (citation omitted). Under this reasoning the distribution policy at issue here should be found to have a secular purpose in light of its text expressing no religious purpose.

that the defendant's policy satisfies the first *Lemon* prong because its purpose was not wholly religious and may have been wholly secular.

Next, *Lemon's* effects prong asks whether the school's distribution policy would likely be perceived by a reasonable observer as endorsing Chrisianity. Put differently, the inquiry can be framed as whether the policy would send a message to a non-Christian that he is an outsider. The court finds that no observer, Christian adherent or not, could reasonably view the Gideon organization's distribution of Bibles in the Rensselaer schools as an endorsement of the Christian faith. Permitting the local Gideons to circulate their literature in public school classrooms is no more an endorsement of Christianity than allowing little league baseball to disseminate its materials endorses the national pastime. Nor would a reasonable observer perceive a similar leaflet campaign by the American Civil Liberties Union or the Anti-Defamation League of B'nai B'rith as an endorsement of the respective views of these organizations.

This court is mindful of the Supreme Court's caveat that the judiciary be especially vigilant when reviewing religious messages aimed at young school children. Children of tender years are more likely to misapprehend the character and content of the message and infer a symbolic union between church and state when none is intended or existent. But the Court has also made clear that the context in which governmental conduct occurs can be dispositive of an establishment clause issue. *Compare Stone v. Graham*, 449 U.S. 39, 42, 101 S.Ct. 192, 194, 66 L.Ed.2d 199 (1980) (per curiam) (public school use of Ten Commandments for inspirational purposes held unconstitutional), *with Abington School District v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963) (religion and Bible studied in purely pedagogic manner held constitutional). Thus, where the Bible is used in a purely academic manner, there is no establishment clause violation, even when a public funded teacher

leads such instruction during regular hours on school property.

In this case, where the Bibles emanated not from the teacher but from a private actor, who did not engage in a proselytizing recitation of scripture and verse, but merely invited each student to take a Bible and read it, the court finds that no message of official endorsement resulted. The defendant's policy offering school students exposure to the many facets of thier local community (including the religious) does not constitute the school's imprimatur as to each such facet.

Were the plaintiffs to have their way, the Rensselaer school system would exclude only religious groups from access to its classrooms. All other groups seeking permission to distribute their literature would be welcomed. In such a case, could an observer conclude other than that the purpose of the exclusion was to *disapprove* of religion? Such a purpose would be manifestly hostile to religion generally and thus run afoul of the first *Lemon* prong. The school system's policy permitting the dissemination of literature of many local groups, whether of a religious affiliation or not, thus cannot reasonably be said to be an endorsement of any particular secular or religious viewpoint.

Finally, the third *Lemon* prong addresses whether the governmental action fosters an excessive entanglement with religion. The prohibition against excessive church-state entanglement reflects the principle that secular and religious realms must not unduly overlap, else government would be destroyed and religion degraded. *Engel v. Vitale*, 370 U.S. 421, 431, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1962). The Bergers argue that in three respects the distribution of Bibles constituted an impermissible entanglement of the school in Gideon's affairs: first, the distribution of Bibles had become an annual school event; second, the principal of the Rennsselaer Middle School (where the fifth graders are housed) once

had been a special guest at a Gideon banquet as a "thank-you" for allowing its representatives to visit the school; and, third, objecting parents whose children had received Bibles were instructed to return them to their children's teachers. The court finds that the described school involvement with the Gideon's distribution of Bibles is merely incidental and does not rise to the level of an "excessive entanglement" with religion.

Unlike in *Lemon*, the school's inconsequential involvement here does not amount to a "comprehensive, discriminating, and continuing state surveillance" of the challenged religious activity. *Lemon*, 403 U.S. at 619, 91 S.Ct. at 2114. The Rensselaer school system does not engage in the day-to-day administration of religion as was condemned in *Lemon* and its progeny. The Gideons' visits have occurred but once a school year, and then only for a few minutes at a time. During these periods the teachers remain silent and out of the way, staying in the classroom merely in a custodial capacity to ensure good student behavior. The Gideons provide the entire funding for the Bibles they hand out, and they alone are responsible for the presentation. Under these circumstances the court cannot conclude that the school's involvement is so great as to amount to an excessive entanglement with religion in violation of the first amendment's establishment clause.

V.

Although the distribution of religious literature in the public schools necessarily presents close and difficult questions of constitutional law, the court finds that the regime in Rensselaer under which these materials are made available to students does not run afoul of the first amendment's establishment clause.

For all of the foregoing reasons, the court concludes that plaintiffs' action for declaratory and injunctive relief is not well-founded and accordingly their request for relief is DENIED. The defendant's motion for summary judgment is GRANTED. SO ORDERED.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

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February 17, 1993

Before
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Senior Circuit Judge*
HON. FRANK A. KAUFMAN, *Senior District Judge* *

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No. 91-2279

JOSHUA H. BERGER and MORIAH BERGER,
b/n/f ALLEN H. BERGER,
*Plaintiffs-Appellants,*

vs.

RENSSELAER CENTRAL SCHOOL CORPORATION,
*Defendant-Appellee.*

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Appeal from the United States District Court
for the Northern District of Indiana, Lafayette Division
No. L 90-19—Allen Sharp, *Chief Judge*

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ORDER

Our slip opinion of January 5, 1993, is hereby amended in the following respects:

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* The Honorable Frank A. Kaufman, Senior District Judge in the District of Maryland, is sitting by designation.

At the bottom of page 6 and the top of page 7 in the main text, remove the words "lined up and" so that the sentence will read, "After the presentation, the students were instructed to take a Bible from a stack of Bibles placed on a table or desk."

On page 9, the second full paragraph shall begin, "This approach suffers from two failings: it distorts the facts and misconstrues the law."

On page 11, line 7, replace the reference to Jews, Muslims, etc., so that the sentence will read, "In any event, it is clear that Rensselaer schools—despite the open policy—were not overrun with members of other religions vying for the students' faith."

On page 12, beginning at line 10, change the phrase "they were still subjected to a pitch by Gideon representatives urging them to study the Christian Bible" to "they were still urged by Gideon representatives to study the Christian Bible."

On page 15, in the third-from-last line of the carry-over paragraph, replace the word "sanctify" with the word "sanitize."

On page 20, second-from-last line, insert "during class time" after "public schools."

On January 19, 1993, defendant-appellee filed a petition for rehearing with suggestion for rehearing *en banc*, and an answer was filed by plaintiffs-appellants on February 3, 1993. All of the judges on the original panel have voted to deny the petition and none of the active judges[1] has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

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[1] Circuit Judge Michael S. Kanne did not participate in consideration of the suggestion for rehearing *en banc*.

## APPENDIX D

RENSSELAER CENTRAL SCHOOL CORPORATION

5500 Distribution, Display or Exhibitation on School Property

5501 Distribution, display or exhibit of materials on school premises shall be conducted as follows:

5501.1 In the best interest of the student body, no person, group, or other organization shall distribute, display, or exhibit any book, tract, map, picture, sign, or other publication of any type on the Rensselaer Central School Corporation premises unless authorized by the superintendent and the building principal.

5501.2 Approval for the distribution, display, or exhibit of any materials by any persons, group, or organizations not sponsored by the school must be cleared 72 hours (three (3) school days) in advance of any distribution, display, or exhibit through the superintendent and the building principals offices. If permitted, the time and location of distribution, display, or exhibit is to be determined by the administration.

5501.3 Rensselaer Central students who wish to distribute any information other than routine classroom or school related materials or school sponsored publications are subject to all provisions as stated immediately above.

5501.4 Rensselaer Central students who do not abide by the above regulations may be suspended from school by the building principal, and re-admitted only after stu-

dent and parental conference with the administration. Reoccurrance of disrespect for the above policy may result in a student being permanently expelled by the Board of School Trustees.

5501.5 Any person, group, or organization not a part of the Rensselaer Central Schools Corporation that does not abide by the above policy, at the request of the school officials, shall be considered guilty of trespass and reported to local civil authorities.

5501.6 Questions concerning the distribution of materials on school premises that are not answered by the above policy shall be presented to the Board of School Trustees for clarification.

No. 92-1561

In The

# Supreme Court of the United States

October Term, 1992

RENSSELAER CENTRAL SCHOOL CORPORATION,

*Petitioner,*

v.

JOSHUA H. BERGER and MORIAH H. BERGER, b/n/f/ ALLEN H. BERGER,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF OF RESPONDENTS IN OPPOSITION


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## QUESTIONS PRESENTED

The Petitioner's statement of the questions presented for review is inaccurate and inappropriate because it is laced with factual characterizations that are slanted, argumentative and not faithful to the record. A fair and objective statement of the issues raised in the courts below is:

1. Does the Establishment Clause of the First Amendment to the United States Constitution prohibit a public school from allowing a sectarian religious organization to proselytize and distribute Bibles to elementary school students in the school building during regular school hours?

2. Did the Petitioner School Corporation intentionally create a designated public forum in the Rensselaer Middle School, thereby endowing the Gideon organization with the right under the Free Speech Clause of the First Amendment to express itself by handing out Bibles to fifth grade schoolchildren?

## PARTIES

Respondents accept and adopt the statement of the Parties set out in the Petition for Writ of Certiorari.

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No. 92-1561

In The

# Supreme Court of the United States

October Term, 1992

RENSSELAER CENTRAL SCHOOL CORPORATION,

*Petitioner,*

v.

JOSHUA H. BERGER and MORIAH H. BERGER, b/n/f/ ALLEN H. BERGER,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF OF RESPONDENTS IN OPPOSITION

## DECISIONS BELOW

Respondents accept and adopt the statement of the Decisions Below set out in the Petition for Writ of Certiorari.

## JURISDICTION

Respondents accept and adopt the statement of the Jurisdiction of this Court set out in the Petition for Writ of Certiorari.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Respondents accept and adopt the statement of the pertinent constitutional provisions, statutes and regulations set out in the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

This action was brought by a parent for himself and his two minor children, students then enrolled in the first and fifth grades at schools operated by the Rensselaer Central School Corporation ("School Corporation"), seeking a declaratory judgment and preliminary and permanent injunctive relief. The plaintiffs alleged that certain practices of the School Corporation involving the distribution and dissemination of religious material is in violation of their rights under the First and Fourteenth Amendments to the United States Constitution and Sections 3 and 4 of Article I of the Constitution of the State of Indiana.

The case was presented to the district court in the posture of cross motions for summary judgment. Two issues were raised: first, whether there was a justiciable controversy giving the plaintiffs standing to sue; and, second, whether the practice of the School Corporation of distributing Gideon Bibles during school hours and on school premises violated the Establishment Clause of the First Amendment to the United States Constitution.

The district court found in favor of the plaintiffs on the first issue, deciding that the plaintiffs had standing. However, based solely on an analysis under the three-pronged test prescribed by *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, 755-756 (1971), the court ruled in favor of the School Corporation on the second, substantive issue, declaring that "[p]ermitting the local Gideons to circulate their literature in public school classrooms is no more an endorsement of Christianity than allowing little league baseball to disseminate its materials endorses the national pastime." *Berger v. Rensselaer Central School Corporation*, 766 F.Supp. 696, 706 (N.D.Ind. 1990). The district

court concluded that "[a]lthough the distribution of religious literature in the public schools necessarily presents close and difficult questions of constitutional law, . . . the regime in Rensselaer under which these materials are made available to students does not run afoul of the First Amendment's Establishment Clause." *Id.* at 707.

In the appeal to the Seventh Circuit Court of Appeals, the School Corporation requested that the proceedings be held in abeyance awaiting the opinion of this Court in *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), which at the time had been briefed and argued, but not decided. The Seventh Circuit obliged, postponing oral argument for ten months and directing the parties to re-brief the issues in light of the opinion in *Lee*. *See Berger v. Rensselaer Central School Corporation*, 982 F.2d 1160, 1162 (7th Cir. 1993).

The Court of Appeals then reversed. Stating that "we must continue to view with suspicion governmental forays into religious activity, particularly in the context of public schools[,]" and finding that "[t]he relationship between the [School] Corporation and the Gideons cannot survive this scrutiny[,]" the Seventh Circuit held that, "[u]nder the principles enunciated in *Lemon* and *Lee*, the distribution of Bibles in Indiana Schools offends the First Amendment of the Constitution." *Id.*

## STATEMENT OF FACTS

### I. Respondent's Statement of Facts

Since 1969, the Rensselaer Central School Corporation has had a policy governing the distribution, display and exhibition of materials on school premises. *Petitioner's App. D.*, p. 42a. With one exception,[1] no person or group other than the

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[1] During the 1985-86 school year, a book entitled *Young People of the Bible* was handed out by the teacher to the members of at least one fifth grade class. *Mindy Suhr Aff.*, ¶3, pp. 239-40, *App.* p. 280. This book, which contained artist's renderings and brief stories about Jesus and several Old and New Testament figures,

Gideons ever sought or was permitted under this policy to distribute religious literature in the Rensselaer schools. *Lewis Dep.* p. 37, *App.* 655.

This policy also governed the distribution of informational materials submitted by non-religious groups, such as the 4-H, the Boy Scouts and the Girl Scouts. According to Superintendent Dinsmore, however, the materials submitted by such groups were nothing more than "sign-up" forms by which parents could, should they wish, indicate "their child's interest" in joining the organization. *Dinsmore Dep.*, pp. 22-23, *App.*, pp. 448-49.

Similarly, Gordon C. Lewis, Principal of the Rensselaer Middle School where the fifth grade is located, stated that the School distribution policy was used in his building only in connection with a history essay contest sponsored by the Daughters of the American Revolution, and math and reading contests. *Lewis Dep.*, pp. 8-10, *App.*, pp. 626-28. In each instance, Mr. Lewis said, the material submitted for distribution merely contained information regarding the steps necessary for interested students to participate in the contests. *Id.*, p. 8, *App.* p. 626. The sole function of the School was "to just make it available and sit [sic] it on a counter in the office and let students know it's there." *Id.* None of it was distributed in the classroom. *Dinsmore Dep.*, p. 23, *App.* p. 449.

For at least 35 years[2] – 15 of which antedate the written policy,[3] the School Corporation has engaged in the annual

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was presented "as a gift" to the children from two local businesses and the "In Jesus' Love" Foundation, Inc. of Rensselaer. *Id.* at ¶4, Exh. A, *App.*, pp. 241-274. *See* 982 F.2d at 1165.

[2] The School Corporation acknowledges that representatives of the Gideon organization annually distributed Bibles to fifth grade students "for so many decades that no one can remember when the practice commenced." *App.*, p. 173. A Gideon representative closely associated with distribution of Bibles in the Rensselaer schools stated that "it probably would have been sometime in the Fifties that it was started, and it was carried on every year with very few exceptions, if any, since that time. . . . " *Kooy Dep.*, p. 7, *App.*, p. 727.

[3] Because the practice of allowing the Gideons to distribute Bibles in the schools began long before adoption of the policy, the nexus between the two is not

practice of distributing Bibles to all fifth grade students. *Kooy Dep.*, pp. 41-42, *App.*, pp. 761-62. For the past several years there have been approximately 145 children comprising five separate fifth grade classes.[4] *Lewis Dep.*, p. 40, *App.*, p. 658; *Brooks Dep.*, p. 21, *App.*, p. 569. The Bibles are provided without charge by the Gideons, and are handed out during regular school hours by two Gideon representatives who are permitted to address the students. *Lewis Dep.*, pp. 23-24, *App.*, pp. 641-42; *Brooks Dep.*, pp. 19-20, *App.* p. 567-68.

Distribution usually takes place in the five classrooms, although it has also been done in the school gymnasium and, on occasion, in the hallway near the principal's office after all fifth graders have been assembled for that purpose. *Lewis Dep.*, pp. 43-44, *App.*, pp. 661-62; *Brooks Dep.*, pp. 22-28, *App.*, pp. 570-76. The fifth grade teacher is present during the distribution of Bibles, *Brooks Dep.*, p. 20; *App.*, p. 568, and the principal of the Middle School. "frequently set [sic] in on the presentations." *Ockermann Aff.*, p. 2; *App.*, p. 789. After delivering a short "spiel"[5] and encouraging the children to read the book they were about to receive, the Gideon representatives ordinarily place a box of Bibles on a desk or table

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as self-evident as the School Corporation suggests. On this point, incidentally, Petitioner erroneously states that the Court of Appeals held the School Corporation's "policy and practices" to be violative of the Establishment Clause. *Petition*, p. 10. To the contrary, Respondents raised an "as-applied" challenge to the *practice* of distributing Bibles to fifth graders; as the Court of Appeals correctly noted, "[t]he policy itself does not treat religion directly and, thus, on its face, raises no Establishment Clause concerns." 982 F.2d at 1163, n.3.

[4] Under Indiana law, each child is required to attend either a public school or some other qualified and licensed school which is taught in the English language. I.C. § 20-8.1-3-17.

[5] "Spiel" was the term used by the district court to describe the Gideons classroom presentation. 776 F.Supp. at 700. It is defined as a "pitch" or speech "for the purpose of luring people to a movie, a sale, etc." *Random House Dictionary of the English Language*, Unabridged Ed., 1369-1370 (Random House 1967). Respondents have always contended that it was just that, a proselytization, however brief. Nonetheless, the School Corporation says that "there was no scripture taught by the Gideons and no proselytizing efforts made by Gideon representatives in the classroom." *Petition*, p. 7. But if the classroom was really a public forum, one might ask, why couldn't, and why didn't, they proselytize?

and the children line up and take a Bible as they pass by. *Brooks Dep.*, p. 20, *App.*, p. 568; *Lewis Dep.*, pp. 42-43, *App.*, pp. 660-661; *Kooy Dep.*, pp. 30-31; *App.*, pp. 750-51 ("They came in a line, well ordered – very orderly. Teachers line them all up and they come by one by one.")

Although the School Corporation had a policy of obtaining the parental permission prior to the distribution, permission slips were not used, at least in recent years. *Lewis Dep.*, p. 21, p. 639; *Brooks Dep.*, p. 15, *App.*, p. 563. More often, the Gideon representative simply advised the children that should their parents object, they could return the Bible – but to the fifth grade teacher, not the Gideons. *Kooy Dep.*, p. 26, *App.*, p. 746.

The Gideon Bibles are not used in the school for any pedagogical purpose; they are not studied for literary or historical value. *Brooks Dep.*, p. 26, *App.*, p. 574; *Kooy Dep.*, p. 42, *App.*, p. 762. In fact, they are not used in the classroom at all; rather, the children are requested to take them as personal gifts and to read them daily. *Kooy Dep.*, pp. 31, 32-33, 42, *App.*, pp. 751, 752-53, 762. The inside back cover of at least some of the Gideon Bibles contained a place for the personal signature of each student under a confession of faith entitled, "My Decision to Receive Christ As My Saviour." *Mindy Suhr Aff.*, ¶6, Exh. A, *App.*, pp. 276, 281.

In all the years Bibles have been distributed, no one ever objected. So, in October of 1989 the Gideon Organization once again made arrangements with the School Corporation to distribute Bibles. However, prior to the planned distribution, based on his belief that "this practice is in clear violation of constitutional principles mandating a separation of church and state," Allen H. Berger, in a letter to the School Superintendent requested "official disavowal of these practices by the Rensselaer school board and a conference with [the Superintendent] to confirm policy directions." *Berger Dep.*, Exh. 1, *App.*, p. 375. Dr. Berger, a professor of anthropology at St. Joseph's College in Rensselaer, made the request on his behalf and that of his two children, Joshua and Moriah.

As a result of Dr. Berger's objection, the Gideons did not distribute Bibles as planned. Middle School Principal Lewis

informed the Gideon representative that the previously arranged date for distribution was no longer "convenient" but that "should there be a reschedule or should [he] need to be back in touch with him, [he] would do so." *Lewis Dep.*, p. 54, *App.*, p. 672. Mr. Lewis "didn't especially at that point permanently cancel" the distribution of Bibles, but told the Gideon representative that "we were in, . . . for lack of a better way to put it, kind of in a holding pattern. . . . " *Lewis Dep.*, p. 52-53, *App.*, pp. 670-71. Mr. Lewis was already acquainted with the Gideon representative, for not only had he dealt with him in prior years, but he had been a special guest at a banquet held by the Gideons the year before "more or less as an officer of the School Corporation." *Lewis Dep.*, pp. 35-36, *App.*, pp. 653-54.

Dr. Berger's letter was then taken up by the Board of School Trustees at a public meeting. At that time, the President of the Board read a short prepared statement that concluded with the statement that "our policy concerning distribution, display or exhibition of [religious] materials on school premises remains unchanged." *Dinsmore Dep.*, Exh. C, *App.*, p. 531. Soon thereafter, Superintendent Dinsmore stated at a faculty meeting that, pursuant to the School Corporation's policy, she would approve for distribution religious materials promulgated by any religious organization other than the "satanists." *Dinsmore Dep.*, pp. 73-74, *App.*, pp. 499-500.

According to the frontispiece of a Gideon Bible distributed in the Rensselaer schools,

> The Gideons International is an Association of Christian business and professional men, banded together in more than ninety countries for fellowship and service. The purpose of the Association is the promotion of the Gospel of Christ to all people, to the end that they might come to follow the Lord Jesus Christ as their personal Saviour.

*Mindy Suhr Aff.*, Exh. A., *App.*, p. 280. The Gideons seek to accomplish this purpose by distributing Bibles so that "men and women and boys and girls might come to be followers of Jesus Christ, accept him as their Lord and savior . . . and

become a confessing Christian in some church." *Kooy Deposition*, pp. 41-42, *App.*, pp. 761-62.

## II. Petitioner's Misstatements of Fact

1. **The School's Policy Was a Trespass Regulation.** At various places in the Petition, the policy adopted by the School Corporation in 1969 is described as "Rensselaer's community literature distribution and access policy." *Petition*, pp. 7, 8, 9, 16, 20, 24, 25. This spin on the text of the policy is obviously intended to buttress Petitioner's argument that the policy was intended to create a public forum in the Rensselaer Middle School.[6] However, that characterization is belied by the policy's title and operative language ("Distribution, display or exhibit of materials on school premises shall be conducted as follows:"), as well as a cursory review of its provisions. *See Petitioner's App.*, pp. 46a-47a.

Clearly, the policy has nothing specifically to do with "literature," nothing at all to do with "access" and only inferentially – if at all – involves the "community." The policy does not encourage persons or parties to use a forum provided by the School Corporation, and neither its language nor tone is invitatory or permissive. On the contrary, it is prohibitory in tenor, negatively stated and obviously designed to place constraints on the use of non-school materials on school premises. If permission is not obtained to disseminate materials in the manner prescribed, bad things happen: students doing so are subject to discipline and outsiders may be prosecuted as trespassers. *Id.* (Pol. Nos. 5501.4 and 5501.5).

Finally, there is nothing in the policy regarding verbal speech. The policy is totally silent as to discourse, discussion

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[6] For like reasons, Respondents disagree with Petitioner's repeated reference to School Corporation "campuses." *Petition*, pp. 20, 22, 23, 24. There are no "campuses" owned by the School Corporation as that term is commonly understood; rather, it seems the term is used only to enhance the argument that this case is to be governed by public forum cases such as *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), which involved a student religious group on the campus of the University of Missouri, and to generally endow this alleged primary school forum with an aura of intellectual sophistication it does not really enjoy.

or debate, traditional uses to which a public forum is put. Indeed, Superintendent Dinsmore testified that the School Corporation had no policy governing verbal presentations to students. *Dinsmore Dep.*, p. 38; *App.*, p. 464. The School Corporation's remarkable suggestion that this testimony supports its attempt to parlay this policy into some kind of equal access open forum is unavailing, for even if representatives of the Boy Scouts, the 4-H and other similar groups spoke directly to students in the school building (and the evidence is they did not do so), by the language of Policy No. 5501 their speech was beyond its intended scope.

2. **Neither the Policy Nor Its Implementation Were Content Neutral.** In similar fashion, Petitioner disingenuously describes the policy as "content neutral" and "viewpoint neutral." *Petition*, pp. 3, 9, 13, 22. The description does not fit.

To the contrary, the policy itself requires that materials submitted for "approval" be "cleared 72 hours (three (3) school days) in advance of any distribution." *Petitioner's App.*, p. 46a (Pol. No. 5501.2). "[U]nless authorized by the superintendent and the building principal," according to the policy, no student or outsider "shall distribute, display, or exhibit" any written publication. *Id.* (Pol. No. 5501.1). Based on this mandatory language one might well ask how else could school authorities possibly administer the policy and determine the acceptability of the material proffered without reviewing its content?

Thus, Petitioner's statement that "Rensselaer's understanding of its role as a school corporation is that it may not censor speech based on its content," *Petition*, p. 20, is patently absurd. Would school officials in that community stand idly by, should an outsider wish to speak to fifth graders on the legalization of marijuana or the use of condoms? *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (high school student's free speech rights held not violated where school officials suspended him for two days for making sexually suggestive speech at school assembly). Indeed, the Superintendent of Schools stated unabashedly that, if the situation presented

itself, she would censor anything presented for distribution by the "Satanists" because "we are responsible for protecting the moral being of the kids." *Dinsmore Dep.*, pp. 73-74; *App.* pp. 499-500; *see* 982 F.2d at 1160. On another occasion, Principal Lewis vetoed a bulletin board display that an outside firm had requested to erect near the door of the school building. *Dinsmore Dep.*, pp. 25-26; *App.*, pp. 451-52.

The fact of the matter is that the School Corporation does censor speech, it does "direct and control" who says what in the classroom all the time. If it did not, not only would it be guilty of shirking its duty to run the schools in an orderly and effective manner, it would render the approval provisions of the policy at issue completely meaningless.

3. **The Fifth Grade Classrooms Were Not Open to Outsiders.** Petitioner states that under the subject distribution policy, "Rensselaer's classrooms have been opened, during class hours, to various speakers from the community and to a diverse assortment of printed literature from private citizens. . . . " *Petition*, p. 3. This statement is misleading at best and a misrepresentation at worst.

Petitioner relies solely on a statement of Superintendent Dinsmore that "the 4-H, the Boy Scouts and et cetera have been allowed to speak to students." *Petition*, p. 4, n.1. The Superintendent's account on this score, however, is neither accurate nor credible, for three reasons: first, the Superintendent got her information second hand from the Principal or faculty at the Middle School, as she was not on site, *see Dinsmore Dep.*, pp. 32, 34, 83; *App.* pp. 458, 460, 509; second, her account contradicts that of the Principal and fifth grade teacher who were directly involved, and from whom she got her information in the first place, *Lewis Dep.*, p. 8-10, *App.*, pp. 626-28; *Brooks Dep.*, p. 8, *App.*, p. 556; and, third, she testified elsewhere that "we do give permission to 4-H, Boy Scouts, summer athletics, and et cetera to distribute permission forms . . . ," *Dinsmore Dep.*, p. 23; *App.* p. 449, indicating that any explanation provided by groups seeking to distribute "sign ups" was undoubtedly done through the Principal's office, as Principal Lewis testified. *Lewis Dep.*, pp. 8-10, *App.*, pp. 626-28. There is simply no probative evidence

that outside speakers other than Gideon representatives personally addressed the fifth grade students in the classroom, auditorium or any other place in the schoolhouse at any time in the past.

4. **Parental Permission Slips Were Not Generally Used.** Petitioner states that "[r]eligious literature distributed by the Gideons in the Rensselaer School System was generally distributed only after parents received parental permission slips" and that use of such forms was "a regular policy and practice." *Petition*, p. 5. This is not accurate.

Superintendent Dinsmore admittedly did not know whether parental approval was obtained or not. *Dinsmore Dep.*, pp. 31, 82; *App.* pp. 457, 508. Concerning permission slips, she said: "No one seems to really remember what was done. Its's amazing." *Id.*, p. 32; *App.*, p. 458. Principal Lewis and fifth grade teacher Brooks were the only school personnel of record directly involved in the distribution of Bibles. Mr. Lewis stated: "I haven't been aware that a parental permission slip was necessary or needed for all the years the students were in the middle school," *Lewis Dep.*, p. 21; *App.*, p. 639, and Ms. Brooks testified that parental permission slips were never used in the eight years she taught in the fifth grade. *Brooks Dep.*, pp. 19, 22, 24-25; *App.*, pp. 567, 570, 572-73.

5. **The Gideon's Presentation and the Distribution of Bibles Usually Took Place in the Classroom.** Petitioner states that only once "in the last six years" was religious literature distributed in the classrooms. *Petition*, p. 7. This statement seems deliberately misleading, for there has been no distribution of Bibles at all in the four school years since Dr. Berger objected in the Fall of 1989. As for prior years, Ms. Brooks, the person most likely to know, testified that in the eight years she taught the fifth grade, Bibles were distributed each year and that distribution took place in the classroom in all but two of those years. She could not remember the exact year distribution took place in the gym and in the hallway near the principal's office. *Brooks Dep.*, pp. 16, 22-23; *App.*, pp. 564, 570-71. Contrary to the impression Petitioner seeks to convey, the Superintendent's understanding was that the appearance of Gideons in the classrooms was

a "pretty consistent" practice. *Dinsmore Dep.*, p. 35; *App.*, p. 461.

6. **The Gideon's Presentation and the Distribution of Bibles Took Place As Part of Regular Classroom Activities.** Petitioner states that "distribution of material under the policy, whether religious or not, was all done 'outside the instructional time.' " *Petition*, p. 7. This absurd statement is apparently based on Superintendent Dinsmore's convoluted testimony concerning a 1988 directive from the State Department of Education concerning the prescribed length of the school day and school year. *Dinsmore Dep.*, p. 69-72; *App.*, pp. 495-98. Testifying that the State required 300 minutes per day for instructional time, Ms. Dinsmore said that "we have extra minutes without instructional time that we can utilize for release time." *Id.*, p. 71, *App.* p. 497. As for "release time," she said: "Let me stop and think for a moment. There still may – I do not recall, but it seems to me there still may be something in there on release time for religious training, but I cannot swear to that." *Id.* In any event, Ms. Dinsmore stated that she had no assurances from teachers or principals that the distribution of Bibles was actually made during "release time." *Id.*

More straightforward was the testimony of fifth grade teacher Brooks: "Q. Do you recall whether [the distribution of Bibles] was prior to the opening of school or following the closing of regular school hours? A. Oh, it was during the school day." *Brooks Dep.*, p. 22.

## SUMMARY OF THE ARGUMENT

Petitioner's entire public forum argument is nothing more than a diversion, a proverbial "red herring." The very thought of a public forum in a fifth grade classroom is "oxymoron-ic", ludicrous on its face – an exercise in *reductio ad absurdum*, as one court has said. The Court of Appeals was correct in observing that the reason the Gideons seek to distribute Bibles in the school on school time is because there and then they can address a captive audience, not because a fifth grade

classroom is a good place to attract a crowd. More importantly, the Appeals Court's application of public forum law to the School Corporation's claim that it never "censored" speech but created a "community forum" for the debate and discussion of ideas in its elementary school classrooms, is sound and its conclusion on the point is unassailable.

This diversion from the real issues was necessary because the School Corporation's Bible distribution program cannot stand scrutiny under Establishment Clause jurisprudence as expressed in either *Lemon* or *Lee* or, as here, both of these important cases. The Court of Appeals "took its lead" from *Lee*, holding that that very recent decision "leaves little room for public schools to teach or promote religion, and the distribution of Gideon Bibles cannot fit in these restrictive confines." However, it "would have decided this case this the same way had the Supreme Court never heard *Lee* ," also holding that two of three parts of the more traditional *Lemon* test had been violated. In summary, *Lemon* and *Lee*, considered separately or in tandem, place the Rensselaer School Corporation's Bible distribution program outside the parameters of constitutionally acceptable public school involvement in religion.

The decision of the Court of Appeals in this case is well conceived and clearly and forcefully expressed. More importantly, it reaches the correct result, one that is consistent with the decisions of this Court in the important areas of speech and religion.

The Petition for Certiorari should therefore be denied.

## ARGUMENT

### I. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioner has asserted that the decision of the Court of Appeals conflicts with Supreme Court decisions involving the First Amendment in two areas: religion (establishment clause) and speech (public fora). Neither argument is persuasive.

### A. Establishment of Religion Clause

#### 1. The Seventh Circuit Decision Is Consistent With *Lee v. Weisman*.

Viewing traditional Establishment Clause analysis under *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), as not boding well for its Bible distribution policy, during the appeal to the Seventh Circuit the School Corporation suggested a hiatus while this Court worked on *Lee v. Weisman* which, at the time, had been argued but not decided. Perceiving *Lemon* as "highly unfavorable to its position," the School Corporation "anxiously, almost gleefully" awaited *Lee*, expecting "a radical change in Establishment Clause jurisprudence to allow more state involvement with religion." 982 F.2d at 1162.

As we know, this did not happen. Referred to in some quarters as "the revolution that wasn't,"[7] the decision in *Lee* had an effect quite different from that expected by the School Corporation, causing it to put as much distance as possible between its distribution of Bibles and the graduation prayer in *Lee*.

Having beaten this retreat, the School Corporation now states that the Court of Appeals' reliance on *Lee* is "misplaced," *Petition*, p. 14, and that it violated *Lee*'s "essential holding", which is that "the *state* must 'direct and control' religious speech in order to violate the Establishment Clause." *Petition*, p. 19. This argument is based on the fact that, in *Lee*, the school principal decided that an eighth grade graduation ceremony should begin and end with a prayer and invited Rabbi Gutterman to lead them. To aid his preparation, the principal provided the Rabbi with a "Guideline for Civic Occasions," and asked that the prayers be nonsectarian. *Lee v. Weisman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467, 481 (1992). Here, the School Corporation asserts, it did not decide that religious activity should occur, it did not select the

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[7] Tyner, Mitchell A., "Lee v. Weisman: The Revolution That Wasn't." *Liberty Magazine* 12 (September/October 1992).

speaker and it gave no advice regarding the content of the message. *Petition*, p. 20.

The Court of Appeals correctly discerned that, "[i]n essence, this is an argument that the distribution of Gideon Bibles lacked state action." 982 F.2d at 1165. "Under this view," the court continued, "the Corporation was merely a conduit or neutral non-participant through whose doors ideas could pass without changing or being changed by the schools' participation." *Id.* In addition to referencing the analysis of the Court of Appeals, which is right on the mark, *Id.* at 1165-66, the Respondents offer a few additional observations.

First, implicit in this argument is that the School Corporation remains perfectly neutral and does not become engaged in any decisional way in the process leading to the annual distribution of Bibles. But are we to believe that Gideon representatives just wander into fifth grade classrooms whenever they get the urge and hand out whatever they want? Of course not. The School's policy itself requires that the superintendent and the principal approve the material three school days in advance and that, "[i]f permitted, the time and location of distribution . . . is to be determined by the administration." *See* 982 F.2d at 1162, n.1. Bibles have been distributed in the Rensselaer schools for the past 35 years, and school officials have always given their complete approval as Gideon representatives head for the fifth grade classrooms each Fall with large boxes of books under their arms.

Moreover, this argument – and this reading of *Lee* – unduly raises to a level decisive of Establishment Clause issues the factual determination of who it is that *initiates* and *constructs* the religious speech. Because the Gideons, not the School Corporation, request leave to distribute Bibles, so the argument goes, the School is just "a conduit or neutral non-participant." 982 F.2d at 1165. After all, in *Lee*, wasn't it the principal who invited the Rabbi to lead the prayers, and wasn't it the principal who directed that they be non-sectarian?

Aside from the fact that there is nothing in *Lee* nor any other Establishment Clause case supportive of this proposition,[8] it doesn't make any sense. Would the decision in *Lee* have been any different had Rabbi Gutterman contacted the principal and asked to pray the benediction, rather than the other way around? Or would the decision have been different had he shown a draft of his prayer to school officials and obtained their approval prior to the graduation ceremony, similar to the procedure in Rensselaer? Would it have been different if, instead of offering a prayer, the Rabbi had distributed a religious tract to the students as they lined up for their diplomas? It is absolutely inconceivable that the Rensselaer public schools would permit unknown persons or groups to come into the classrooms, auditoriums and hallways of its school buildings and say or do anything in the presence of primary school children without the "direction and control" of its administrative officers. In fact, exercise of "direction and control" is the obvious purpose of the School's distribution policy in the first place.

Finally, in its Petition, the School Corporation provides a recitation the facts of *Lee* that purportedly distinguish it from

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[8] In the religious display cases, for example, it has never been critical that the government, rather than a private person or organization, requests the display of a creche or menorah on public property in order to run afoul of the Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668, 671, 104 S.Ct. 1355, 79 L.Ed.2d 604, 608-609 (1984) (creche exhibited on public property as joint undertaking of retail merchants' association and city of Pawtucket, R.I.); *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 579, 587, 109 S.Ct. 3086, 106 L.Ed.2d 472, 485, 490 (1989) (county permitted Holy Name Society to display creche on its property; menorah owned by Jewish organization, but stored, erected and removed by city of Pittsburgh). Under *Lemon* and its progeny, violation of the Establishment Clause turns mainly on whether the state *endorses* the speech, not on who requests that it be delivered. Endorsement may be evidenced by the state's active participation or its passive acquiescence. Thus, initiation and design of the speech may be factors bearing on the endorsement issue, but they are not outcome determinative as the School Corporation suggests. *See e.g., Doe v. Village of Crestwood, Ill.*, 917 F.2d 1476, 1478-1479 (7th Cir. 1991) (fact that Village selected and recruited priest to pray an "Italian Mass" in Village festival in public park evidence of endorsement, but other evidence could have been introduced at trial to show that private club was true sponsor of the Mass).

those in evidence here. *Petition*, pp. 19-20. The Respondents close this part of the argument by providing the following, more comprehensive list of comparisons:

| | Lee | Berger |
|---|---|---|
| 1. | School (state) sponsored religious prayer. | School (state) approved distribution of religious literature. |
| 2. | Subject matter (prayers at graduation ceremony) is non-sectarian. | Subject matter (Gideon Bibles) is sectarian (Christian). |
| 3. | School children are 8th graders, 14 years of age. | School children are 5th graders, 10 years of age. |
| 4. | Activity occurs outside regular class time. | Activity occurs during regular class time. |
| 5. | Attendance is voluntary. | Attendance is compulsory. |
| 6. | Teachers do not directly participate in the activity. | Teachers directly participate in the activity (e.g., line up the students to receive Bibles; receive Bibles returned by students). |
| 7. | Purpose of outside speaker is not proselytistic. | Purpose of outside speaker is admittedly proselytistic.[9] |
| 8. | Parents (or custodial adults) are ordinarily present. | Parents (or custodial adults) are not present. |

As far as comparing this case to *Lee* on the facts, the Seventh Circuit found that the First Amendment principles announced in *Lee* should be applied here, *a fortiori*:

> The [School] Corporation's practice of assisting Gideons in distributing Bibles for non-pedagogical

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[9] The frontispiece of a Gideon Bible distributed in the Rensselaer schools provided: "The purpose of the [Gideon] Association is the promotion of the Gospel of Christ to all people, to the end that they might come to follow the Lord Jesus Christ as their personal Saviour." *Lisa Suhr Aff.*, Exh. A; *App.*, p. 280.

> purposes is a far more glaring offense to First Amendment principles than a nonsectarian graduation prayer.

*Id.* That conclusion is eminently correct.

### 2. The Seventh Circuit Decision Is Consistent With *Lemon v. Kurtzman*.

Although the Court of Appeals focused primarily on *Lee*, it also held that the School Corporation's Bible distribution policy violated two of the three prongs of the Establishment Clause test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 123 (1971), which it acknowledged to be "the law of the land." 982 F.2d at 1171. Specifically, the Seventh Circuit held that the Bible distribution policy has "the effect of sending a message to an objective observer that the [School] Corporation endorses the Gideon's beliefs, and it entangles the government unnecessarily in religious affairs." *Id.*

a. **The School's Distribution of Gideon Bibles Has the Effect of Endorsing Christianity.** With respect to *Lemon*'s second prong, the Court of Appeals concluded that a reasonable observer would likely perceive the School Corporation's annual distribution of Gideon Bibles as an endorsement[10] of Christianity.

In this case, the "reasonable observer" contemplated by the standard is, first and foremost, a representative fifth grade student to whom a Gideon Bible is offered; secondly, it is the "objective observer, acquainted with the text, history and

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[10] Speaking for the Court, Justice Blackmun discussed the meaning of "endorsement" in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94, 109 S.Ct. 3086, 106 L.Ed.2d 472, 494-95 (1989):

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a persons's standing in the political community." *Lynch v. Donnelly*, 465 U.S. at 687, 79 L.Ed.2d 604, 104 S.Ct. 1355 (O'Conner, J., concurring).

implementation of the [practice]." *Wallace v. Jaffree*, 472 U.S. 38, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29, 56 (1985) (O'Conner, J., concurring). Though it appears the "objective observer" should be acquainted with free exercise values, Justice O'Conner recognized that religious intrusions into public schools should be viewed from the perspective of the school children affected:

> At the very least, Presidential Proclamations are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.

*Id.*, 472 U.S. at 81, 86 L.Ed.2d at 59 (O'Conner, J., concurring). However you look at it, "inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years." *Grand Rapids School District v. Ball*, 473 U.S. at 390, 87 L.Ed.2d at 281.[11]

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[11] *See also Lee v. Weisman*, 505 U.S. ___, 120 L.Ed.2d at 484 ("these are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools" (citation omitted)); *Grand Rapids School District v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 87 L.Ed.2d 267, 281-82 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."); *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S.Ct. 3330, 77 L.Ed.2d 1019, 1028 (1983) ("Here, the individual claiming injury . . . is an adult, presumably not readily susceptible to 'religious indoctrination' or peer pressure." (citations omitted)); and *Widmar v. Vincent*, 454 U.S. 263, 274 n.14, 102 S.Ct. 269, 70 L.Ed.2d. 440, 450 n.14 (1981) ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."); Tribe, *American Constitutional Law*, 1178 n.53 (2d Ed. 1988).

Turning the second *Lemon* prong toward the practice in Rensselaer of distributing Bibles in the schoolhouse, either the informed objective observer or the fifth grade student observer should consider the following facts:

> First, the Gideon International, an evangelical Christian organization, has been distributing Bibles in the Rensselaer schools for more than 35 years, and that materials of no other religious persuasion have ever been disseminated in the Rensselaer schools. *Dinsmore Dep.*, p. 23, *App.*, p. 449.

Second, distribution of Bibles is made on school premises, during school hours in the presence of school teachers. In recent years, the principal is also present, a flourish which cannot but create the impression that something of official importance is taking place.

Third, distribution of Bibles usually takes place in the classroom, although on some occasions they are handed out in the gymnasium, auditorium or the hallway in front of the principal's office. While the School Corporation has argued that the auditorium or hallway is somehow less likely to be viewed by the children as a sign of endorsement, as the Court of Appeals noted, "the image of hundreds of students being marched into an auditorium for the yearly distribution of Bibles cannot but leave the imprimatur of state involvement." 982 F.2d at 1166.

Fourth, the children are instructed that if their parents object to the Bibles they receive from the Gideons, the students should return them – to the teacher.

Fifth, the Bible is not part of the fifth grade curriculum and there is no effort to use it pedagogically in any course of study.

Sixth, the proselytizing material set forth in the front and back of the Gideon Bible should be considered, particularly the confession of faith entitled, "My Decision to Receive Christ as my Saviour" under which is a space for the date and signature of the student recipient.

Seventh, it appears that the Gideon Bibles were the only materials distributed to fifth graders that truly expressed

ideas, concepts or a system of values or beliefs.[12] Moreover, no representative of any organization other than the Gideons ever appeared on school premises to personally distribute material of any description, secular or sectarian. Therefore, the only material intended to be studied or assimilated for its intrinsic intellectual value, and the only organization engaged in promoting it, were the Christian Bibles and The Gideon International, respectively.

Finally, the "reasonable observer" should consider the fact that in 1985, in addition to Gideon Bibles, the book "Young People of the Bible" was handed out to fifth grade elementary students, this time by the teacher, not an outsider. *Mindy Suhr Aff.*, ¶3, *App.*, pp. 239-240. This book, the second promoting Christianity received by fifth graders that year, was published by "In Jesus' Love" Foundation, Inc., and underwritten by two local businesses. *Id.*, Exh. A, *App.*, p. 243. It celebrated young people "because a person in his youth most truly reflects the glory of his Creator, in whose image he is made." *Id.*, Exh. A, *App.*, p. 244. The school children were urged to "learn from Jesus Himself, who gathered the little children around Him and told us that 'of such is the kingdom of heaven.' " *Id.* Near the end of the book is a quotation from Daniel Webster, which read in part:

> . . . if the power of the Gospel is not felt throughout the length and breadth of the land, anarchy and misrule, degradation and misery, corruption and darkness, will reign without mitigation or end.

*Id.*, Exh. A., *App.*, p. 273.

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[12] Even if the school granted the same access to the Boy Scouts, Girl Scouts, 4-H and similar groups, it may well be that fifth grade students would view the school as endorsing those organizations. (After all, weren't they, too, "approved" by the superintendent and the principal under the policy?) Indeed, the school may be sending an implicit message of endorsement of these groups when it sends along the permission forms to the students' parents. However, there is no constitutional prohibition against the school endorsing such secular groups as there is against its endorsement of religious groups.

Can these fifth grade schoolchildren, ten years of age, sensitive and impressionable,[13] be expected to conclude anything but that their School endorsed, promoted and favored the Christian religion? Or, for that matter, could a reasonable observer – a person of another generation, older, wiser and more knowledgeable – reasonably reach any different conclusion?

b. **The School's Distribution of Gideon Bibles Entangled It With A Religious Sect.** The conclusion of the Court of Appeals regarding the entanglement prong of the *Lemon* analysis was also correct, for at least the following reasons.

> First, the practice of distributing Bibles had become so much a part of the school calendar that, according to the School Corporation, "no one can remember when the practice commenced." It is not an exaggeration to say that the distribution of Gideon Bibles was about as natural and commonplace in the Rensselaer Middle School as Thanksgiving vacation. It was clearly part of the fall schedule, part of the routine.
>
> Second, the very nature of the in-school distribution scheme necessarily involves school officials. Teachers and administrators do exercise authority over students in the classrooms and auditoriums, and it is only natural that they would queue the children so they might pass by the table and pick up a Bible in an orderly manner.
>
> Third, the relationship between the Gideons and the School administrators had become so close that Mr. Lewis in his capacity as Principal of the Middle School which housed the five fifth grade classes, was a special guest at a banquet held by the Gideons. The invitation, according to Mr. Lewis,

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[13] Lisa Suhr stated that, when as a 10 year old fifth grader she received a Gideon Bible in 1986, two representatives of the Gideon organization, a man and a woman, were introduced by a school official. Although she did not remember the name or title of the school official, she did remember "thinking that the two Gideon representatives were named 'Mr. and Mrs. Gideon.' " *Lisa Suhr Aff.*, ¶4, *App.*, p. 276.

was "basically a thank-you" for allowing Gideon representatives to come into the classrooms. *Lewis Dep.*, pp. 35-36, *App.*, pp. 653-654.

A fourth factor is the administrative arrangement by which students were directed to return Gideon Bibles if and when, after arriving home with them, their parents objected. The school children were instructed to return the Bibles, not to the Gideon representatives who handed them out, but to their fifth grade teacher. *Kooy Dep.*, p. 26. Thus, contrary to the protestations of the School Corporation, school teachers were indeed involved in the distribution procedure. By being involved, even marginally, the School Corporation and the Gideons become identified – that is to say, "entangled" – with one another.

Finally, if one accepts the School Corporation's policy as intended to expose students "to the many facets of their local community" as Petitioner suggests, note must be made of the further requirement of the policy that school officials review the application of every organization that submits materials for distribution. In so doing, of course, the school becomes a censor. It is not surprising then that the Superintendent of Schools would state that, because "we are responsible for protecting the moral being of the kids," *Dinsmore Dep.*, p. 74, *App.*, p. 500, she would decide what would be distributed and what would not. *Id.*, p. 75, *App.*, p. 501 ("It has to be my professional decision."). The Superintendent went on to say that she would approve for distribution materials promulgated by any religious organization except the "satanists" and any other group that is "truly disruptive to the young people of any community." *Id.* at 74, *App.*, p. 500.

Applying its policy in this fashion, the School Corporation was deaf to the early teaching of *Engle v. Vitale*,[14] and blind to the "symbolic link between government and religion" created "in the eyes of impressionable youngsters," *Grand Rapids School District v. Ball*, 473 U.S. at 385, 87 L.Ed.2d at 278, by the undifferentiated interplay between school and church evident in the Bible distribution practice.

Contrary to the decision of the district court, the evidence of entanglement cannot so easily be brushed aside. The Court of Appeals applied the third *Lemon* prong to this evidence and found that the Bible distribution program in the Rensselaer schools constituted excessive entanglement of the government in religious matters. 982 F.2d at 1171. That conclusion, too, is correct.

### B. Free Speech Clause

Petitioner submits that "the correct Constitutional question is one of Free Speech and Public Forum jurisprudence and not the Establishment Clause." *Petition*, p. 22. This assertion is based on the proposition that the School Corporation did in fact create a public forum, presumably in the fifth grade classrooms of the Rensselaer Middle School, and that it proved it did so.[15]

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[14] 370 U.S. 421, 431, 82 S.Ct. 1261, 8 L.Ed.2d 601, 608 (1962) (purposes of the Establishment Clause rest "on the belief that a union of government and religion tends to destroy government and to degrade religion," and "upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand."); *see also Aguilar v. Felton*, 473 U.S. 402, 409-10, 105 S.Ct. 3232, 87 L.Ed.2d 290, 297-98 (1985).

[15] There is no question but that "public elementary schools are not, as to the general community, traditional public fora." *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 679 (2d Cir. 1988); *see also May v. Evansville Vanderburgh School Corp.*, 787 F.2d 1105, 1113 (7th Cir. 1986). The burden of proving that a school has been turned into a public forum is thus on the party asserting it.

As the record reveals, however, the School Corporation did not prove what was not true.[16] Describing this argument as an "attempt[ed] definitional coup," one that "distorts the facts and misconstrues the law," 982 F.2d at 1165, the Court of Appeals concluded:

> It is dubious whether public schools could or should be used for such purposes, but the salient point here is that Rensselaer school classrooms were not, in fact, open and active fora for competing ideas, contrary to assertions by the Corporation.

*Id.* at 1166. The Court of Appeal's assessment of the evidence is fair and correct, and need not be repeated here.[17]

Worth mentioning, however, is that once before the Seventh Circuit considered the prospect of a public forum in a grade school setting.[18] *May v. Evansville Vanderburgh School Corp.*, 787 F.2d 1105 (7th Cir. 1986), was an action brought by an elementary school teacher to enjoin a ban on religious meetings held by teachers outside instructional time but on school premises on grounds that the ban violated her free speech rights. After a careful review of the characteristics of public and limited public fora, the court turned to a third kind of forum:

> Finally, there is public property not intended to be a forum for the public expression of ideas and opinions. . . . A non-public forum is not necessarily

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[16] We are reminded of this Court's admonition that forum classification "should be triggered by what a school does, not what it says." *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 244, 110 S.Ct. 2356, 110 L.Ed.2d 191, 212 (1990).

[17] It should not go unmentioned that the district court, which never applied nor even mentioned public forum principles of law, did not make a finding that the School Corporation had created a public forum. *See* 766 F.Supp. at 703-707. There never has been a judicial determination to that effect in this case, the negative conclusion of the Court of Appeals being the only one ever entered on this issue.

[18] *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), on which the School Corporation primarily relies, neither of which involve primary schools, were correctly distinguished by the Court of Appeals on that and other grounds. 982 F.2d at 1167-68, 1167 n.6.

> a place of silence; it may still be a forum, as the term implies; it just is not a place generally open to the public. It does not lose its character as a non-public forum merely because outsiders are occasionally invited to speak. A college classroom (and *a fortiori* an elementary school classroom) does not become a public forum because a guest lecturer from the outside is invited to talk to the class.

*Id.* at 1113.

And so it is here. The primary school classrooms in Rensselaer are, at best, non-public fora. There is no open forum in the Rensselaer schools. The School Corporation did not open its schools, by policy or practice, "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794, 806 (1983); "the public [was] not invited to use its facilities as a soap box," *May v. Evansville Vanderburgh School Corp.*, 787 F.2d at 1113, 1114; and its fifth grade classrooms were never "a limitless potpourri of expressive activity." *Quappe v. Endry*, 772 F.Supp. 1004, 1010 (S.D.Ohio 1991).[19] The fact that the School Corporation occasionally opened its doors to some outside organizations "does not transform [its] property into a public forum." *Perry*, 460 U.S. at 47, 74 L.Ed.2d at 806.

As Judge Posner once said, "There are public forums and there are public forums." *May v. Evansville Vanderburgh School Corp.*, 787 F.2d at 1113. The fifth grade in the Rensselaer Middle School just isn't one of them.

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[19] Acknowledging that the courts have come to recognize the ability of college and high school students to participate in the "market place of ideas" (*Widmar* and *Mergens*, respectively), the district court in *Quappe* deemed it "an exercise in *reductio ad absurdum* to extend this participation to grade-schoolers." *Id.* at 1012.

## II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUIT AND STATE COURTS.

Petitioner states that "the Constitutionality of the distribution of Bibles in public schools" is a matter that "has been decided in conflicting ways by state and federal courts across the country." *Petition*, p. 13. As authority for this assertion, Petitioner cites a single secondary source, a footnote reference to an annotation, 111 A.L.R.Fed. 135.

A review of that authority, however, reveals three cases in which Bible distribution was approved: *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990), cert. denied 498 U.S. ___, 111 S.Ct. 253, 112 L.Ed.2d 211 (1990), a legitimate public forum case involving the after-hours rental of a high school auditorium by a religious group; *Bacon v. Bradley Bourbonnais High School District*, 707 F.Supp. 1005 (C.D.Ill. 1989), where the Gideon organization distributed Bibles on the sidewalk in front of a public school, a case cited in the trial and appeal courts by the Respondents as properly decided; and, finally, you guessed it, the district court's decision in this, the *Berger* case, before it was reversed in the Court of Appeals. *See* 111 A.L.R.Fed. at 141-42, 147-49. The fact of the matter is that none of these cases lend the slightest support to this Petition for Certiorari.

This is not to say that the courts have not, from time to time, had occasion to pass on the constitutional propriety of distributing Bibles in the public schools during school time. Without exception, however, the courts have found such practices violative of the Establishment Clause.

The first reported case involving the distribution of Gideon Bibles in the public schools is *Tudor v. Board of Education of Borough of Rutherford*, 100 A.2d 857 (N.J. 1953), cert. denied 348 U.S. 816, 75 S.Ct. 25, 99 L.Ed. 644 (1954). Under relatively similar facts, the Supreme Court of New Jersey had no difficulty concluding that the practice violated the First Amendment:

> It matters little whether the teachers themselves will distribute the Bibles or whether that will be done by

> members of the Gideons International. The same vice exists, that of preference of one religion over another. This is all the more obvious when we realize the motive of the Gideons. Its purpose is "to win men and women for the Lord Jesus Christ, through . . . placing the Bible – God's Holy Word . . . or portions thereof in hotels, hospitals, schools, institutions, and also through distribution of same for personal use." The society is engaged in missionary work, accomplished in part by placing the King James version of the Bible in the hands of public school children throughout the United States. To achieve this end it employs the public school system as the medium of distribution.

*Id.* at 868. The avowed purpose of the Gideons in New Jersey in 1953, incidentally, is virtually the same as the Gideons in Rensselaer today. *See Lisa Suhr Aff.*, Exh. A., *App.*, pp. 278-281; *Dinsmore Dep.*, Exh. E, *App.*, pp. 539-544.

The next case involving Gideon Bible distribution was *Brown v. Orange County Board of Public Instruction*, 128 So.2d 181 (Fla.App. 1960). Recounting the history of the Gideon organization and articulating the doctrine of separation of church and state, the court concluded:

> The distribution of Gideon Bibles through the school system each year certainly approximates an annual promotion and endorsement of the religious sects or groups which follow its teachings and precepts. This distribution likewise would tend to impair the rights of plaintiffs and their children to be free from governmental action which discriminated in the free exercise of religious belief.

*Id.* at 185 (citations omitted). The court reversed a trial court ruling dismissing the complaint of the parents of affected public school children. *Id.* at 186.

A similar result was reached in *Goodwin v. Cross County School District No. 7*, 394 F.Supp. 417 (E.D.Ark. 1973). Again noting the avowed missionary purpose of the Gideon organization, the court struck down "the practice . . . approved by the School Board and permitted by the school

authorities of distributing the Gideon Bible by a representative of the Society to the fifth grade students" as violative of the First Amendment. *Id.* at 428.

Later on in the seventies, a Florida school board adopted guidelines governing the dissemination of religious books and doctrine of all denominations. While designed to religious minorities as applied only the Gideon organization took advantage of the arrangement. Indeed they did, for nearly 33,000 Bibles were handed out in cafeterias and other common areas of the schools before suit was brought. The Fifth Circuit then declared the practice an unconstitutional entanglement of church and state in *Meltzer v. Board of Public Education of Orange County, Florida*, 548 F.2d 559, 574-76 (5th Cir. 1977). Although this decision was subsequently vacated by an equally divided *en banc* panel of the Fifth Circuit, 577 F.2d 311, 312 (5th Cir. 1978) (*en banc*) (*per curiam*), on grounds of mootness and non-justiciability because Bible distribution in the future under similar circumstances was unlikely, a five-judge minority reached the merits, saying in dissent:

> [I]ndoctrination is more likely where students are younger, less experienced, less skeptical, and more impressionable. The distribution efforts involved here are aimed at just such students – those in elementary and secondary schools. These young children cannot help but be influenced by the school's approval of the presence of Gideon Bibles as being in itself an approval of Gideon doctrine, lest why else would the books be allowed. Second, the aid in the present case is clearly of an ideological nature – the distribution of the Bible, an instrument of religion which cannot be gainsaid. Finally, the [Supreme] Court . . . warned against permitting aid of a continuing nature. In the present case the Gideons have made repeated visits to the schools and have even made a request, though tabled by the Board, to allow even further distribution efforts.

*Id.* at 319 (dissenting opinion). *See also Bell v. Little Axe Independent School District*, 766 F.2d 1391 (10th Cir. 1985)

(distribution of Bibles deemed moot where Gideons stated they would no longer distribute at Little Axe or any other school in Oklahoma, and school had no plans to distribute Bibles from any other source).

Simply stated, there is no conflict in pertinent decisions among the federal circuits, nor is there any authority involving the distribution of Bibles in public schools contrary to the decision rendered by the Seventh Circuit in this case. As such, there is no conflict for this Court to resolve, and no compelling reason of this sort that the Petition for Certiorari be granted.

## CONCLUSION

The decision below is not in conflict with the decisions of this Court or those of any Court of Appeals. The Seventh Circuit Court of Appeals properly held that the policy and practice of distributing Bibles on school premises during school time by the Rensselaer Central School Corporation constitutes a violation of the Establishment Clause of the First Amendment to the United States Constitution. Accordingly, on the basis of the record in this case and the arguments and authorities set forth in this Response, Respondents respectfully request entry of an order denying the Petition for Writ of Certiorari.

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April 27, 1993

Supreme Court, U.S.
MAY 4 - 1993

No. 92-1561

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

RENSSELAER CENTRAL SCHOOL CORPORATION,
*Petitioner,*

v.

JOSHUA H. BERGER and MORIAH H. BERGER,
b/n/f ALLEN H. BERGER,
*Respondents.*

**On Petition for Writ of Certiorai to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF FOR PETITIONER

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**On Petition for Writ of Certiorai to the United States Court of Appeals for the Seventh Circuit**

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## REPLY BRIEF FOR PETITIONER

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### ARGUMENT

Except for brief argument on the law relating to public fora and decisions in other courts, the Respondents ("Bergers"), essentially devote the balance of their *Brief* to factual arguments. As a consequence, the Petitioner ("Rensselaer") will primarily address the factual arguments made by the Bergers in their *Brief*. The factual errors by the Bergers divide handily into three major categories: monumental errors, moderate errors and minimal errors.

## I. BERGERS' MONUMENTAL ERRORS.

### A. The Bergers' Assertion that No Speakers Expressed Themselves to Students on Rensselaer Campuses is Factually Incorrect.

Throughout the Bergers' *Brief* they attempt to give the impression to this Court that no speakers appeared on Rensselaer campuses and addressed students.[1] They suggest that there is no "evidence" of speeches to Rensselaer students (*Brief*, p. 9).

Superintendent Dinsmore's testimony that the 4-H, Boy Scouts of America, Tri-Kappa Sorority, Gideons International and other unnamed groups, came to the school to "speak to students" (*App.* p. 464) is certainly evidence before the Court on this point.

The Bergers even refer to a statement by Rensselaer in its Brief that "Rensselaers' classrooms have been opened, during class hours, to various speakers from the community and to a diverse assortment of printed literature from private citizens . . ." as a statement which "is misleading at best and a misrepresentation at worst". *Respondents' Brief* p. 10. The Bergers then attempt to buttress this somewhat serious characterization of the Rensselaer position by referring to a number of pages (pp. 458, 460, 509, 626-628, 556) of the Appendix in this case. However, none of the cited pages support their assertion, nor serve to nullify Dinsmore's testimony as to speakers.

Consequently, the effort by the Bergers to prove that there were no speakers on the Rensselaer campuses must be seen as a representation which is unsupported in the record. If there is any failing in this particular area, it is the failure of the Bergers to neglect to ask any other

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[1] Bergers dispute Rensselaer's reference to its campuses, as an attempt to add an aura of "intellectual sophistication." However, the district court also employed this term in its Opinion, referring to the Rensselaer "campus". (*Petition*, p. 40a).

deponents at their respective depositions as to the matter of speakers on the campuses. Consequently, the only probative evidence before the court was that various speakers from various groups appeared at the Rensselaer campuses over the years prior to the bringing of this suit.

The Bergers' argument is in further direct contradiction of both the district and circuit court findings in this case. The district court referred to "exposure to the many facets of their local community (including the religious)" (*Petition*, p. 42a) and the circuit court made reference to the "*talks* by groups such as the Boy Scouts, the 4-H Club and a sorority" and other references to speech by outside persons entering the Rensselaer campuses (*Petition*, p. 12a, emphasis added).[2]

Though the Bergers might not like the evidence in the record, the evidence is uncontradicted that *speakers* entered the Rensselaer campuses, made 'talks" to students and distributed literature. Therefore, it is a monumental error to suggest, as the Bergers have (*Brief*, p. 9), that there is no evidence that speakers addressed Rensselaer's students.

**B. The Bergers have Mischaracterized the Actions of the Gideons, who did not Abuse Rensselaer's Policy by Proselytizing Students.**

A quick reading of the Bergers' *Brief* could lead a casual observer to conclude that this is a case about proselytizing by the Gideons, and that the proselytizing is proven by an affidavit by a student, Lisa Suhr. The Bergers rely regularly and heavily on Ms. Suhr's affidavit to support their argument that the Gideons pros-

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[2] The circuit court, though acknowledging the evidence that speeches occurred on Rensselaer's campuses, decried the speeches as "isolated" and "irregular", though there is nothing in the Record to indicate frequency. The circuit court failed to state any jurisprudential basis for its holding that the number of speeches given was too "few" to meet Constitiutional standards.

elytized when they were on campus. The Bergers even state on page i of their *Brief* under the Questions Presented section that a "sectarian religious organization . . . proselytize(d) . . ." in school buildings. (*Brief*, p. i). On page 6 of Bergers' *Brief*, the Bergers refer to the "inside back cover" of some of the Gideons' Bibles as containing a place for a personal signature of each student for a confession of personal faith.[3]

Throughout the Argument section of their *Brief* the Bergers make repeated references to alleged proselytizing efforts by the Gideons. (*Brief*, pp. 17, 20, 22, 28). What is striking in this monumental error, however, is the fact that the Bergers have full knowledge, from the prior proceedings in this case, that Lisa Suhr's affidavit has been discredited. Lisa Suhr stated in her affidavit that she had received a green-covered Bible. *App.* pp. 275-281. However, Gideon member Kooy, *App.* pp. 758-759, stated that the Bibles distributed were always red-covered and did not contain the proselytizing material which is in the green-covered Bibles, distributed by Gideons other than in elementary or high schools. Virtually everyone testifying in the case remembered the play on words by the Gideons that because the Bible had a red cover "it was meant to be read" therefore casting great doubt on Lisa Suhr's affidavit and the frequent reference by the Bergers' as to the proselytizing material in the "green-covered" Bible. *Brooks* dep., *App.* p. 567; *Lewis* dep., *App.* p. 641; *Kooy* dep., *App.* p. 752; *Bosgraff* dep., *App.* pp. 792-793 and *Bozell* Affidavit, *App.* p. 798.

David S. Bosgraff submitted to the court an affidavit in which he stated that the Gideons had:

> "never distributed to students in the Rensselaer school system, or any other public school system, Gideon Bibles which contained printed sections in the

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[3] The Bergers twice incorrectly identify the affidavit as that of Mindy Suhr, instead of Lisa Suhr, who is the correct affiant. (*Brief* pp. 6, 7).

> inside back cover of the Bible separately setting forth scripture and a place for the personal signature of each student under a confession of faith entitled 'My Decision to Receive Christ as My Savior'. Bibles containing these pages are only distributed to college students who are outside of public schools, and have never been distributed by the Jasper County Camp of Gideons International to students in the Rensselaer school system." (*App.* pp. 792 and 793)

In adidtion, Bosgraff stated that "it was always two men, and never a man and a woman" who distributed Bibles, and consequently the statement in Lisa Suhr's affidavit that she remembered a man and a woman passing out Bibles, which she recalled as a "Mr. and Mrs. Gideon" must throw further doubt on Lisa Suhr's affidavit.

As to the actual message conveyed by the Gideons to Rensselaer students, both the district and circuit court referred to the brief non-proselytizing messages by the Gideons. The district court stated that the Gideons "did not engage in a proselytizing recitation of scripture and verse." *Petition* p. 42a. The circuit court referred to the red-covered Bibles as being the Bibles which were distributed by the Gideons and cited the pun made about the cover. *Petition* p. 8a. The circuit court further referred to the fact that the Gideons spoke for a minute or two "about their organization". *Petition,* p. 8a. Hardly a finding that the Gideons proselytized.

Therefore, the Bergers have monumentally erred in attempting to portray that which did not occur. This was *no* "religious exercise". The Gideons did not abuse their privilege of literature distribution in the Rensselaer school system by proselytizing the students therein.

### C. The Bergers Err in Arguing that the Circuit Court Opinion is Consistent with *Lee*.

In the first major section of the Bergers' *Brief* (pp. 14-18), they state that the opinion of the circuit court

is consistent with *Lee v. Weisman*, —— U.S. ——, 112 S. Ct. 2649, 120 L. Ed. 2d 745 (1992). However, the four page argument submitted by the Bergers to support this position fully ignores the argument by Rensselaer on this point. Rensselaer noted in its Petition (also at pp. 14-18) that the circuit court completely overlooked the twenty-three references to a "religious exercise", albeit an overt, formal and explicit religious exercise, prayer, which occurred in Providence, Rhode Island in *Lee*. The Gideons' non-proselytizing short talks about their organization, and following distribution of abridged-Bibles, did not constitute a "religious exercise." Therefore, the Bergers have the unenviable task of trying to apply *Lee's* proscription against state-sponsored "religious exercises" to what was clearly not a "religious exercise" (*Petition* p. 42a).

The point raised by Rensselaer in its Petition is obviously that the school decided in *Lee* to have a "religious exercise." In the instant case, however, the school only opened its campuses to private speakers and one of the private speakers entering the campuses happened to be religious. In the instant case, Rensselaer *never* decided to have any religious exercise and there is *nothing* in the record to show that Rensselaer ever framed or composed its campus literature distribution policy to favor in any manner the distribution of religious materials.

Therefore, the Bergers have the same problem as the circuit court had in relying almost entirely on *Lee*, in that *Lee* really doesn't apply to the case at bar for all of the reasons as set forth above.

### D. The Bergers' Argument that the Seventh Circuit Opinion is Consistent With *Lemon* is Likewise Misplaced.

The Bergers are presented with an equally difficult task in trying to maintain, as they do on pages 18 through 22 of their *Brief*, that the circuit court decision is con-

sistent with *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 123 (1971). The Bergers argue that the Rensselaer literature distribution policy has the effect of endorsing Christianity.

What is most perplexing for the Bergers is that though they argue at length that the literature distribution policy has the effect of endorsing Christianity, the circuit court thought so little of this argument that it only made brief mention of it in a single line when it held that the policy has "the effect of sending a message to an objective observer that the (school) Corporation endorses the Gideons' beliefs. . . ." However, the circuit court then wholly failed to explain how it arrived at its conclusion, nor does it set forth with any additional analysis why Rensselaer's literature distribution policy "endorsed" a particular religion. (Though which religion, Christianity or Judaism, both of whose sacred texts were distributed, is not stated.) Consequently, though the Bergers have labored mightily to try to make the argument, the circuit court did not arrive at a studied and cohesive conclusion on this point.

The Bergers then argue that the Rensselaer policy violates the third prong of the *Lemon* analysis, i.e., entanglement. At this point in their Brief the Bergers make no argument of their own, deferring instead to six quoted paragraphs from the circuit court's opinion relating to entanglement. Consequently, Rensselaer would refer the Court to the district court's determination that Rensselaer's involvement did *not* excessively entangle it with religion. See *Petition* pp. 42a-43a.

## II. BERGERS' MODERATE ERRORS.

### A. The Bergers' Contention that Rensselaer Failed to Create a Limited Public Forum is Incorrect.

Rensselaer would rely upon the argument made on pages 21 through 23 of its *Petition* on this point. In addition, it should be noted that this Court has recog-

nized the principle that government may designate a public forum, while at the same time limiting that forum according to certain neutral, legitimate criteria. Government, for example, may open a forum limited to certain *media* of expression, such as drama (see *Southeastern Promotions Ltd. v. Conrad*, 429 U.S. 167 (1976)), or certain *classes of speakers*, such as students, (see *Widmar*), to official bargaining representatives (see *Perry Educational Association v. Perry Local Educators Association*), 460 U.S. 37 (1983), or to direct service providers (see *Cornelius v. NAACP Legal Defense and Educ., Inc.*, 473 U.S. 788 (1985)) or limited to certain subject matter such as school board business (see *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976)). The difficulty arises, of course, when government attempts to stray from neutral *regulations* on speaker status, subject matter or manner of speech, and instead begin *censoring* the content or viewpoint of otherwise eligible speakers and speech. This violates the First Amendment. *E.g., Widmar v. Vincent*, 454 U.S. 263 (1981) (unconstitutional to ban religious speech by otherwise eligible speakers); plus see *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573-76 (9th Cir. 1984), cert. *denied* 471 U.S. 1054 (1985).

### B. Teachers Did Not Line Up Students to Receive Bibles in the Rensselaer Schools.

The Bergers state in their *Brief* that teachers "directly participate(d)" in the distribution of Bibles by the action of "lin(ing) up the students to receive Bibles" (p. 17). However, even the circuit court acknowledged that it was in error in its original opinion when it stated that students were "lined up." In its Amended Order of January 5, 1993 the circuit court removed the words "lined up and" so that the sentence now reads "After the presentation, the students were instructed to take a Bible from a stack of Bibles placed on a table or desk." (See

*Petition*, p. 45a).[4] The circuit court even went so far as to hold that "The teachers, though present, did not participate in handing out the Bibles" (*Petition*, p. 8a). Consequently, the representation by the Bergers that the teachers in some manner "lined up" students in the classroom to receive Bibles is contrary to the Record.

### C. The Bergers' Assertion that the Policy was not Content Neutral is Incorrect.

On page 9 of the Bergers' *Brief* they state that Rensselaer "disingenuously" describes its policy as "content neutral" and "viewpoint neutral." However, Rensselaer is not alone in describing the policy as being content neutral and viewpoint neutral. The district court held that "The policy on its face is content neutral; it does not mention a supreme being, the holy scripture or make other religious reference." *Petition*, p. 40a. The circuit court likewise stated "The policy itself does not treat religion directly, and, thus, on its face, raises no Establishment Clause concerns." *Petition*, p. 5a, footnote 3.

## III. BERGERS' MINIMAL ERRORS.

### A. The Record Confirms, and is Without Contradiction, that Extra Minutes Outside of Instructional Time were Used for "Release Time" or for Other Purposes, Such as Listening to Speakers and Receiving Literature.

On page 12 of Bergers' *Brief* they characterize Superintendent Dinsmore's testimony as to the extra minutes provided in each day according to a 1988 directive from the State Department of Education as "convoluted".

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[4] As noted in Rensselaer's *Petition*, this finding by the circuit court, that the students were "instructed to take a Bible" is likewise factually incorrect as the teacher took no part, hence did not "instruct" and the Gideon representative only *asked* students to take one if their parents would approve.

However, it is obvious that the Bergers do not appreciate Superintendent Dinsmore's testimony that "we have extra minutes without instructional time that we can utilize for release time" because it contradicts their argument, that in some manner, the distribution of literature in the classrooms was within instructional time. However, no matter how "convoluted" the testimony may be in the eyes of the Bergers, nevertheless, Superintendent Dinsmore's testimony is uncontradicted on this point.

**B. The Bergers' Repeated Reference to Fifth Graders as Ten Years Old is Partially Incorrect.**

In Indiana, by statute, a student must begin elementary education by the age of seven. Consequently, the reference by the circuit court to fifth graders as either ten *or eleven* years old (*Petition,* p. 11a) is more on the mark. The Bergers longingly refer to fifth graders as "sensitive and impressionable" (*Brief* p. 22). Were it so. Though this description of fifth graders has a certain melancholy appeal, any parent with a fifth grade child recognizes that in today's culture fifth graders know more about life and the realities of contemporary society than similarly-aged students of decades past.

## CONCLUSION

For the foregoing reasons, and for the reasons as set forth in the initial Petition For Writ of Certiorari, this Court should reverse the judgment of the Seventh Circuit.

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